

FEDERAL COURT OF AUSTRALIA

Goldman Sachs JBWere Services Pty Limited v Nikolich [2007] FCAFC 120

CONTRACT – incorporation of terms – employment contract – whether particular representations in policy and procedures manual were terms of employment contract.

CONTRACT – breach – whether employment contract breached by employer failing to comply with term found to have its source in policy and procedures manual.

CONTRACT – causation – psychiatric injury – whether open to the trial judge to find that employer's breach caused employee's injury.

COSTS – *Workplace Relations Act 1996* (Cth) – whether s 170CS applies to the whole of a proceeding or only to that part that relates to s 170CP.

COSTS – *Workplace Relations Act 1996* (Cth) – whether s 347 applies to appeals from proceedings under s 170CP.

Workplace Relations Act 1996 (Cth), ss 170CK, 170CP, 170CR, 170CS, 347

Baltic Shipping Company v Dillon (1993) 176 CLR 344 cited
Barber v Somerset County Council [2004] 1 WLR 1089 cited
Bostik v Gorgevski (1992) 36 FCR 439 considered
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 considered
Gogay v Hertfordshire County Council [2000] IRLR 703 followed
Grout v Gunnedah Shire Council (No 3) (1995) 59 IR 248 considered
Hawkins v Clayton (1988) 164 CLR 539 considered
Johnson v Unisys [2003] 1 AC 518 considered
Koehler v Cerebos (2005) 222 CLR 44 cited
Lister v Romford Ice and Cold Storage Co Limited [1957] AC 555 referred to
Loftus v Roberts (1902) 18 TLR 532 cited
Malik v BCCI [1998] AC 20 cited
Maritime Union of Australia v Geraldton Port Authority [2000] FCA 16 cited
McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 689 referred to
Naidu v Group 4 Securitas [2005] NSWSC 618 cited
New South Wales v Mannall [2005] NSWCA 367 cited
Riverwood International Australia Ltd v McCormick (2000) 177 ALR 133 considered
Scally v Southern Health and Social Services Board [1992] 1 AC 294 cited
State of New South Wales v Paige (2002) 60 NSWLR 371 distinguished
Tai Hing Cotton Mill Limited v Lui Chong Hing Bank Limited [1986] AC 80 cited
Thorby v Goldberg (1965) 112 CLR 597 cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 applied
Waters v Commissioner of Police of The Metropolis [2000] 1 WLR 1607 cited

**GOLDMAN SACHS J B WERE SERVICES PTY LIMITED v PETER NIKOLICH
NSD 1361 OF 2006**

**BLACK CJ, MARSHALL & JESSUP JJ
7 AUGUST 2007
SYDNEY**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 1361 OF 2006

**ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF
AUSTRALIA**

**BETWEEN: GOLDMAN SACHS JBWERE SERVICES PTY LIMITED
 Appellant**

**AND: PETER NIKOLICH
 Respondent**

JUDGE: BLACK CJ, MARSHALL & JESSUP JJ

DATE OF ORDER: 7 AUGUST 2007

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed in part.
2. Order 3 made by the trial judge on 23 June 2006 be set aside.
3. The appeal be otherwise dismissed.
4. The appellant pay 90% of the respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

BLACK CJ

1 This is an appeal against a judgment for damages for breach by the appellant
("GSJBW" or "the firm") of a contract of employment between it and a former employee, the
respondent Mr Peter Nikolich.

2 The appeal raises issues about the content of the employment contract, which the trial
judge found to be contained in part in a formal letter of offer and in part in a lengthy
document entitled "Working with Us" ("WWU"). The appellant submits that the judge erred
in finding that sections of WWU were terms of the contract of employment.

3 The appellant argues, in the alternative, that even if there were terms as found by the
trial judge, there was no proper basis for his finding that they were broken. Alternatively
again, it argues that if GSJBW was in breach, the breaches were not causative of the
respondent's loss which was, in any event, too remote.

4 The damages awarded by the trial judge reflected his Honour's finding that
Mr Nikolich suffered a serious psychological injury resulting in loss of income, including
loss of future income. The judge awarded \$435,896 under this head. His Honour awarded a
further \$80,000 by way of general damages for pain and suffering. The appeal also raises an

issue about the award of damages of such a character for breach of contract.

5 The case at trial included claims based upon s 52 and/or s 53B of the *Trade Practices Act 1974* (Cth) and s 170CK(2)(a) and (f) of the *Workplace Relations Act 1996* (Cth). These claims were rejected by the trial judge and have not been further pursued. The claim under the *Workplace Relations Act* is, however, relevant to an issue about costs, for the trial judge awarded costs to the respondent notwithstanding s 170CS of the *Workplace Relations Act*.

6 Mr Nikolich did not argue at trial that GSJBW had been in breach of any common law duty to take reasonable care not to subject him to working conditions reasonably likely to cause him psychiatric injury. He did submit, however, that GSJBW had broken what could be seen as a broadly equivalent term, said to be implied in the employment contract. Having found for Mr Nikolich on the footing that the express terms had been broken, the primary judge made no finding about any such implied term and that matter was not raised on the appeal.

CONTRACT OF EMPLOYMENT

7 In May 2000, Mr Nikolich accepted an offer of employment as an associate investment adviser in the Canberra office of GSJBW. It was common ground that the contract of employment was constituted at least in part by a letter of offer dated 4 May 2000. The letter began:

“We are pleased to confirm our verbal offer of employment to you ...”

It then set out various terms under headings such as Remuneration, Incentive and Annual Leave, covering the essential elements of the employment relationship. It required a signature confirming “acceptance of the details and conditions of employment as outlined above”. It concluded: “I hereby accept your offer of employment as detailed in the above letter” with a space for Mr Nikolich’s signature.

8 Mr Nikolich accepted GSJBW’s offer by signing the letter in their Canberra office. When he did so he had in his possession the document titled “Working with Us”. The trial judge’s findings as to precisely when WWU came into his possession are not altogether clear, but it was admitted in the appellant’s defence, and it seems not contested at trial, that

Mr Nikolich was given the document when he was first offered employment. This was some days before he signed the letter of offer.

“WORKING WITH US”

9 WWU contains 119 pages and covers many topics. It is prefaced with a welcome by the Executive Chairman and by the Group Manager of Human Resources and includes a brief overview of the history of J B Were from its foundation by Jonathan Binns Were in Melbourne in the mid-19th century. Evidently this section had its origins prior to GSJBW being constituted in its present form.

10 Under the heading “JBWere Team Purpose – Culture In Practice” the document addresses the culture and business philosophy of the firm. This section stresses the importance of a shared purpose. Statements about the culture of the firm include the following:

“Respect and Courtesy

We treat each other with respect and courtesy, as individuals who want the opportunity to contribute, learn and succeed in a positive, safe, secure and inclusive environment that respects diversity. Although we are aggressive in the market place, we are not aggressive with each other.”

The section concludes with the observation:

“It is this team purpose that sets the standard for our practices, behaviour and conduct.”

11 The next section, headed “Overview of our main services”, is largely descriptive and draws on such matters as a commitment “to maintain a culture of compliance within the organisation”. A one page section “Steps to Creating Client Value” is followed by a very lengthy section entitled “Code of Conduct”.

12 The Code of Conduct section covers a large and diverse range of topics, arranged alphabetically and ranging from “Chinese Walls” to “Welcoming Diversity and Preventing Discrimination”. It concludes with quotations by senior people within the firm about diversity, the prevention of discrimination and the value placed by the firm on respect for its people.

13 Within the Code of Conduct section some provisions are expressed in the language of advice, others in the language of direction and some in the language of contract. As an example of the latter, the section headed “Other Employment” begins:

“It is a condition of employment with the firm that no person who is employed on a full-time basis may engage in work for anyone else...”

This particular matter was not dealt with in the letter of offer. Less emphatically contractual in language, but nevertheless more than merely advisory, the “General Obligations” concerning electronic mail are prefaced by “For the duration of your employment... you will agree to...”

14 Under the separate heading “Harassment” it is said that

“The JBWere culture and ‘family’ approach means each person is able to work positively and is treated with respect and courtesy. It is within the context of our culture that all people within the JBWere team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated in any work related situation and where that reaction is reasonable in the circumstances.”

15 Other sections of the Code of Conduct contain statements of a broadly informative nature. Some others reflect the firm’s aspirations. Matters of fine detail, such as what to do if a mobile phone is lost, are also included.

16 Another section of WWU is entitled “JBWere Team Support Package”. This is also diverse in content but is notable for its description of the many benefits provided for employees. In general, the language in which the Support Package is expressed does not suggest that these benefits have their source elsewhere. The section has, according to the index, eight sub-sections covering support for career management, support for ideas and innovation, support for personal time, support for health and well-being, support for community involvement, support for families, support for parents and support for personal issues.

17 The next section, entitled “Reward Strategy”, is again diverse in content. It includes

quite detailed provisions about overtime, the circumstances in which it will be paid and the rates at which it will be paid. Unless descriptive of entitlements sourced elsewhere (in which case the reader is left to guess their source) parts of this section are plainly contractual in concept and language.

18 WWU concludes with a section entitled “Sign-off forms for new JBWere team members and consultants to JBWere.” Most of these forms contain reproductions in whole or in part, or summaries, of particular sections in the main body of WWU. They included sign-off provisions relating to “Procedures for Harassment – Concerns or Complaints” (which is a reproduction of, and substantial expansion upon, the “Harassment” and “Concerns or Grievances” parts of the Code of Conduct and Support Package sections of the document) and a Health and Safety Statement (which is a summary and partial rewriting of the Health and Safety part of the Support Package section.)

19 Although the appellant contended at the trial, and initially on the appeal, that “WWU ... was not incorporated into the contract of employment” and that the provisions relied upon by the respondent “did not constitute a term or condition of the contract of employment” it accepted during the hearing of the appeal that some sections (but not those in issue) did form part of the contract of employment. This distinguishes the present case from *Riverwood International Australia Ltd v McCormick* (2000) 177 ALR 133 where there was a question whether any of the content of a document had been incorporated in the contract of employment; the question here turns on the language of the further document which evidently, and concededly, had contractual elements.

20 WWU was apparently intended to serve several purposes. One was to make it plain that GSJBW is an excellent place to work by reason of the pervasive nature of its “culture and ‘family’ approach” as reflected in WWU. In this way the firm no doubt held itself out as being more attractive to talented people who would value and respond to such a culture. Other purposes were to inform and to inspire employees. Much of the content of WWU is directed to these ends.

21 The language and content of the document speaks also of a contractual purpose, as the appellant accepts. As I have noted, some of the language and content is clearly contractual. The circumstance that prospective employees, including the respondent, were required to sign

attachments is also suggestive – although by no means conclusive – of a contractual purpose and strengthens the conclusions that may be drawn from some of the language used.

22 The difficult question is not whether WWU had any contractual effect, for this is now rightly conceded, but whether the portions relied upon by the respondent and found to be terms by the primary judge did indeed have that character or whether, on the other hand, they were at most mere representations of the firm’s aspirations.

23 The principles to be applied in determining whether any, and if so what, parts of WWU were terms of the contract of employment are not in doubt. It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179, the Court said:

“It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.”

“EVERY PRACTICABLE STEP TO PROVIDE AND MAINTAIN A SAFE AND HEALTHY WORK ENVIRONMENT”

24 The trial judge found that it was a term of Mr Nikolich’s contract of employment that “JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people” and that the firm was in breach of that term. The finding of such a term had its basis in the judge’s conclusion that the explicit promises made by the firm in WWU should be regarded as express terms of Mr Nikolich’s contract of employment.

25 The statement held to be a term appears in two sections of WWU. In the section

entitled “Support for Health and Well-Being”, the first item is “Health and Safety” and the first paragraph of that item commences: “*JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people.*”

26 The paragraph continues with the statements that prevention is the most effective health and safety principle and that “[t]hrough a shared responsibility, co-operation and support from all people” the firm will realise its health and safety objectives and create a safe working environment. It is said that health and safety is a shared responsibility of the firm and each team member. The document continues: “[i]n fulfilling this responsibility, the firm has a duty to provide and maintain, so far as is practicable, a working environment that is safe and without risk to health.”

27 The same “every practicable step” sentence, also heads the Health and Safety Statement in the sign-off section of WWU but in this section the sentence is in bold type and stands isolated from the text that follows it. There is further reference to health and safety being a shared responsibility and again it is said that in fulfilling this responsibility “the firm has a duty to provide and maintain, so far as practicable, a working environment that is safe and without risk to health”.

28 In contending that the trial judge was wrong in finding that there was a term of this nature the appellant argued that the language was not contractual and that the statement was merely aspirational. It was said that to construe these statements in WWU as contractual terms involved giving a meaning to them that could not have been reasonably intended.

29 As I have noted, the test is objective. What matters is what the language used, in context, would have led a reasonable person in the position of Mr Nikolich to believe. Context is very relevant. Here, it is plain that in WWU the firm was holding itself out as having a commitment, which it regarded as very important, to provide a caring and safe working environment based upon mutual respect and concern. To repeat examples referred to earlier: “*The JBWere culture and ‘family’ approach means each person is able to work positively and is treated with respect and courtesy*” and “*Although we are aggressive in the market place, we are not aggressive with each other*”.

30 The difficulty is that the statement in issue is not explicitly contractual in its language

and could be seen as merely aspirational. It appears in a document of mixed content and purposes and, although these include contractual purposes, at least the primary repository of the employment contract is unambiguously elsewhere. The context is, however, decisive. In the context of WWU as a whole, if the statement that the firm “*will take every practicable step to provide and maintain a safe and healthy work environment for all people*” were no more than an aspirational representation, imposing no obligation on the maker, it would be seen as an exercise in hypocrisy. The statement is a reflection of, and is central to, WWU’s expression of the “culture” of the firm and its approach to its staff, and its aspirations about the approach its employees will take to each other. The language used, taken in the context as a whole, points to the statement embodying a contractual obligation and the trial judge was correct in holding that it was a term of the contract.

31 This conclusion is supported by the broad equivalence of the content of the statement with an employer’s common law duty of care to an employee, to commonly imposed statutory duties and to the term that the law will imply in a contract of employment. Contracts of employment that are silent about an employer’s obligations carry with them an implied term that the employer will take reasonable care to provide a safe place of work and a safe system of work. To take “every practicable step to provide a safe and healthy working environment” may be putting the standard somewhat higher, but not very much higher. The term found by the trial judge in this case, as interpreted reasonably according to the language used, does not greatly extend the obligation that would exist by implication at common law.

32 Moreover, whilst it might well be an answer to say that such could not have been the intention if, as a term, it was impossible to comply with, that argument cannot be sustained on the proper construction of the language used in this instance.

The meaning of “every practicable step”

33 It is convenient to consider now the meaning of “every practicable step” since it was suggested at one point in argument that “practicable” was synonymous with “possible”. It was also suggested that the obligation was impossibly wide since “practicable” was not qualified by “reasonably” as it usually is in Australian occupational health and safety legislation.

34 In its ordinary meaning and also in its present context, practicable is not synonymous with “possible”; what is possible may not be practicable. Does, however, “practicable” in the present context extend to impose an obligation to do something that is unreasonable? To my mind it does not. Whilst it is true that statutory obligations to do what is practicable to protect health and safety are nearly always qualified by reference to reasonableness, in the context of WWU some such qualification is implicit. In a statute, an obligation to do what is practicable might be qualified by the adverb “reasonably” as a matter of prudence but in a document such as WWU the qualification emerges implicitly from the absurdity of supposing that, in the absence of the clearest language, an employer is to be taken to have put itself under an obligation to take safety measures that are unreasonable.

HARASSMENT

35 The trial judge also found that statements in WWU about harassment and about grievance procedures were promises of a contractual character. This conclusion was also challenged by the appellant on appeal. Counsel contended that the language was plainly not promissory.

36 The section entitled “Harassment” reads:

“HARASSMENT

The JBWere culture and “family” approach means each person is able to work positively and is treated with respect and courtesy. It is within the context of our culture that all people within the JBWere team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated in any work related situation and where that reaction is reasonable in the circumstances.

The professional behaviour and conduct of each team member is important. It is a reflection of the person, the firm and our client service attitude. Further information may be obtained by Human Resources.”

37 Unlike the Health and Safety section, the language here is essentially descriptive. It describes the culture of the firm, its perceived benefits and the firm’s aspirations in that respect. Whilst it reflects an aspiration and indeed an expectation that there will not – for example – be conduct that makes another team member feel humiliated it is not, in my view, reasonably to be taken as a contractual promise that such will not occur.

38 The paragraph set out at [36] is supported by a lengthier section of about two pages in the sign-off section which repeats all but the last sentence of the quoted paragraph and then describes the “aims” and “guiding principles” of the harassment procedures. The further section also gives examples of harassment and explains the steps in the complaints process. The circumstance that the Harassment statement is repeated in the sign-off section, however, takes the matter no further. The language remains descriptive and not promissory.

GRIEVANCE PROCEDURES

39 Within the section entitled “Support for Personal Issues”, two segments entitled “Feeling Uncomfortable?” and “Concerns or Grievances” set out the way in which the firm says it will deal with employee concerns about relationships between people within the firm. These sections include the following:

“We are committed to make sure that anyone who has a genuine concern will be supported, and the issue will be handled with discretion.”

“The door is wide open at all times for people to discuss any issue, not only with Department Heads, Directors, and Human Resources, but also with the Chairman. Such discussions are welcome as the firm has been built on the principle that it is a team with common interests and ideals. This interest extends beyond the range of career and business issues to more personal concerns.”

“We are committed to make sure that anyone who makes a genuine complaint will be able to discuss his concern confidentially, will be supported by the firm and is not penalised in any way.”

40 The trial judge took to be promissory the statement that the firm was “*committed to make sure that anyone who makes a genuine complaint will be able to discuss his concerns confidentially, will be supported by the firm and is not penalised in any way.*” His Honour also found that the obligation to “support” carried with it an implied obligation to carry out an adequate and timely investigation into the merit of any complaint or grievance.

41 The point is a narrow one, but to my mind the passages cited do no more than describe a policy and are not promissory in nature. They describe the firm’s policy in the broader context of advice to employees who, to use the language of WWU, have personal “issues”. The essentially advisory character of the section is established by its opening, which reads:

“Feeling Uncomfortable?”

Sometimes clients, colleagues, managers or people we deal with, say or do things which make us feel uncomfortable, offended, humiliated, degraded or intimidated – and we don’t know how to prevent or deal with it.

Where to go for assistance

If you have doubts as to what is appropriate, or feel that you are placed in a situation that makes you feel uncomfortable, often the best first step is to talk it over with someone who can provide confidential advice and support.”

42 Accordingly, I am persuaded that the primary judge was in error in concluding that the Harassment and Grievance Procedure sections of WWU were contractual.

BREACH

43 As I have said, Mr Nikolich began employment with the appellant in May 2000. By the time the events that gave rise to this proceeding took place, he had been promoted to the position of Investment Adviser and was working in a team with two other investment advisers in the firm’s Canberra office under the supervision of a Mr Sutherland.

44 The trial judge held that the appellant was in breach of the Health and Safety obligation by reason of “the failures and omissions of Ms Jowett”, a human resources manager of the firm based in Sydney. Essentially, the failures and omissions attributed to Ms Jowett came down to delay in responding effectively to complaints by Mr Nikolich about a decision by Mr Sutherland to reallocate certain clients away from him (“the reallocation decision”) and Mr Sutherland’s subsequent conduct towards him, which was said to include “malicious” personal attacks, “threatening and disturbing” actions and comments including false accusations and a “barrage of insults and abuse” which caused Mr Nikolich “a considerable degree of anxiety, stress and discomfort”. The complaints were made in a four-page typed letter to Ms Jowett dated 28 July 2003. It referred to, and was accompanied by, a copy of an article in the *Australian Financial Review* entitled “Bully Bosses a Health Risk for Workers” which cited a recent study that had found that stress caused by bullying in the workplace increased the chance of heart attack or stroke.

45 The appellant argued that the judge’s finding of breach “ignores the primary findings of fact” that steps had indeed been taken by Ms Jowett, that reconciliation between Mr

Sutherland and the respondent was not practicable and that “within four months, Mr Sutherland’s supervision of the respondent was terminated.” The respondent’s broad answer to this contention was simply that the primary judge did take these factors into account but found that the term had been broken nevertheless.

46 His Honour found that Ms Jowett and Mr Heath (Mr Sutherland’s superior) were both on notice “from the beginning” (which I take to be early August 2003) that Mr Nikolich was in an extremely distressed state as a result of on-going conflict with his manager and said that it is “notorious that stress and disturbance of mind may lead to a psychological injury”. He concluded that compliance with the appellant’s Health and Safety obligation (that is, the “every practicable step” term) would have required urgent investigation and resolution of the complaint, the reversal of any inappropriate decision, an attempt to reconcile the respondent and his manager and/or, if appropriate, termination of Mr Sutherland’s supervision of the respondent.

47 Having set out these steps that, in his view, ought to have been “obvious” to both Mr Jowett and Mr Heath, the trial judge concluded:

“An employer who took seriously its obligation to ‘take every practicable step to provide and maintain a safe and healthy work environment’ would have done this. GSJBWS did not.”

48 As I read his Honour’s reasons at [137] to [152] and especially at [274] to [276], the substance of his criticism was directed to delay in taking any appropriate steps to alleviate what was evidently, for Mr Nikolich, a very unhealthy work environment. His Honour found that it was known to the appellant that Mr Nikolich was continuing to work in a small office managed by a person with whom he had come into serious conflict, whose actions he had found extremely intimidating and threatening and with whom he was no longer on speaking terms. These findings were amply supported and were not challenged on appeal. In these circumstances his Honour was plainly correct in concluding that delay in attending to the problems about which Mr Nikolich had complained was unacceptable and in breach of the obligation to “take every practicable step to provide and maintain a safe and healthy work environment.”

49 The findings reported in the article in the *Australian Financial Review* of a link

between workplace stress and health problems could come as no surprise to anyone with significant management experience and surely not to a human resources manager. Certainly there was no suggestion in the evidence of Ms Jowett that such a link was novel and beyond the reasonable contemplation of a human resources manager dealing with a complaint about a manager accused of “insults and abuse” and who was said to have caused “a considerable degree of anxiety, stress and discomfort.”

50 The appellant’s criticisms of his Honour’s observations about the steps that might have been taken by the firm should be considered in the context of his conclusion that the way Mr Nikolich was treated by Mr Sutherland, and the lack of support from the firm in handling his complaints, were at the heart of the breach. However, there are more specific answers. In relation to the criticism that Mr Sutherland’s reallocation decision was not found by his Honour to be inappropriate, the answer is that the judge was not concerned with the rights or wrongs of that decision as such but with the firm’s failure to deal promptly and adequately with the complaint about the decision and about the harassment that followed it. Likewise, the fact that it might have been impossible to reconcile Mr Nikolich and his manager does not bear upon the failure to act promptly to try to sort out the problem.

51 It was said that the trial judge ignored the fact that Mr Sutherland ceased to be Mr Nikolich’s manager in late October 2003. Again, the answer is that this had nothing to do with the essence of the complaint, which was delay from a period commencing in early August.

CAUSATION

52 The plaintiff bears the legal burden of proving causation, which is a question of fact to be resolved as a matter of “ordinary common sense and experience”: see generally the discussion in J Carter & D Harland, *Contract Law in Australia*, 5th ed (2007), [35-20] and following.

53 In this case, the primary judge found that the expert evidence supported the conclusion that the respondent’s psychological symptoms were caused by the way he was treated by the appellant. He also concluded that, assessing the expert evidence as a whole, it did not support the contention (maintained by the appellant in this appeal) that Mr Nikolich’s

psychological problems were the result only or primarily of the reallocation decision made by Mr Sutherland. He concluded that the better view was that the problems stemmed “*more from the aftermath of that decision, in the way Mr Nikolich was treated by Mr Sutherland and the failure of Ms Jowett and others to give him proper support in handling his problems with Mr Sutherland.*”

54 His Honour gave weight to the medical opinions of Dr Jamieson (a treating general practitioner) and Dr Lowden (a consultant psychiatrist to whom Dr Jamieson referred his patient) on the reasonable basis that they were the experts who knew the respondent best.

55 The evidence of Dr Jamieson was in the form of two medical reports, tendered by consent. In his first report, dated 15 April 2005, he said that Mr Nikolich attended his surgery for the first time on 1 December 2003 presenting in “a most distressed state”, and relating a six month history of work place conflict. Dr Jamieson considered that Mr Nikolich had presented with symptoms of a major depressive disorder. He was very concerned about his patient’s mental state at the time and started anti-depressant medication immediately.

56 In response to the enquiry “What aspect of Mr Nikolich’s employment caused or contributed to his psychological condition?” Dr Jamieson reported:

“As recounted to me by Mr Nikolich, the main source of conflict was interaction with one of his managers, who, according to Mr Nikolich, had been involved in unethical practices. Mr Nikolich had been put in a position of ‘whistle-blower’ and had been persecuted as a result of his stand. Mr Nikolich’s feelings of injustice and fears that his career would be destroyed were at the foremost in the development of his clinical disorder”

57 Dr Jamieson evidently accepted the account given to him by Mr Nikolich that workplace conflict was the source of his problem and that the main source of conflict was interaction with one of his managers. This seems to me to be made clear by the last sentence, in which Dr Jamieson expresses the unqualified opinion that Mr Nikolich’s feelings of injustice and fears that his career would be destroyed were foremost in the development of his clinical disorder. I take that sentence to be the doctor’s diagnostic conclusion – not mere repetition of the patient’s complaints.

58 This conclusion is confirmed by the doctor’s response to a question about the effect

the condition had had upon Mr Nikolich's working capacity. Dr Jamieson's response was that Mr Nikolich was "unfit to return to work with JBWare [sic] at present as a result of his clinical disorder and the on-going conflictual climate." Moreover, in answer to a question on prognosis, the doctor concluded that until resolution of the conflict occurred he did not expect any improvement.

59 In his second report, dated 4 April 2006, Dr Jamieson, in response to the question "[What is] your opinion as to the on-going significance, if any, of our client's employment at Goldman Sachs JBWere Services Pty Ltd in respect of this condition[?]" simply answered "This was addressed in my report of 15/4/2005", which supports the conclusion that the views in the earlier report were expressions of clinical opinion and not mere recitations of the patient's complaints.

60 Dr Lowden, the psychiatrist, reported that Mr Nikolich had told her that work related problems such as betrayal of trust, lack of respect and people not being open, as well as difficulty getting a job in Canberra and financial pressures were causing his illness. In her first report, dated 19 May 2005, Dr Lowden did not express an opinion about this but made a provisional diagnosis of major depression anxiety, which could be bipolar in nature.

61 In a psychiatric assessment report dated 13 March 2006, Dr Lowden answered specific questions from Mr Nikolich's solicitors. In answer to the question: "[What is] your opinion as to what aspect or aspects of our client's employment, if any, caused, aggravated or contributed to our client's psychological condition[?]", she responded:

"In my opinion betrayal of trust and lack of respect, difficulty in conflict resolution at the workplace and a hostile work environment".

62 The evidence of the other doctors was not contradictory. Dr Lucas (a psychiatrist) attributed the respondent's symptoms to his employment without being any more specific. Dr Synnott (another psychiatrist) made no findings about the cause of the symptoms but referred to the respondent's report that he had made several complaints at work and felt that nothing had been done and that he had "no support" and "felt alone". Dr Samuell (yet another psychiatrist) reported that the respondent was "extremely angry and upset about the reallocation decision" but also that he "became withdrawn and extremely upset" as a result of "abusive and derogatory" treatment by his manager and his belief that "the firm [was] not

acting on his complaints”. The psychologist appointed by the appellant, Mr O’Neill, reported that “[f]rom a psychological point of view, there is no doubt that Mr Nikolich was distressed by his perception of how Mr Sutherland dealt with his concerns last year...”

63 The medical evidence therefore amply supported the primary judge’s conclusion that the psychological damage to the respondent was caused by the aftermath of the reallocation decision, “in the way Mr Nikolich was treated by Mr Sutherland and the failure of Ms Jowett and others to give him proper support in handling his problems with Mr Sutherland.”

64 There was also the evidence of Mr Nikolich himself. It must be remembered that his Honour had the advantage of hearing his evidence as well as that of Ms Jowett and Mr Sutherland and that, for reasons he gave, was unimpressed by Mr Sutherland as a witness and preferred the evidence of Mr Nikolich, whom he regarded as a witness of truth. Mr Nikolich deposed to Mr Sutherland being belligerent and aggressive towards him, to feeling angered, betrayed, bullied and discriminated against and to the fact that he began to feel very stressed both at work and at home. He also deposed to having had, between July and December 2003, increasing feelings of depression, anxiety, anger and stress. His evidence was consistent with the medical reports of his treating doctors. This was evidence that the primary judge was in a good position to take into account on the question of causation.

65 It was thus open to the judge to reject the submission that the reallocation decision was “the cause” of the appellant’s psychiatric injury and to conclude that in fact his injury was caused by the appellant’s breaches of the terms of the contract of employment.

66 As well as arguing that the trial judge should have found that the reallocation decision was “the cause” of the injury, counsel for the appellant submitted that the judge was in error in not applying a “but for” test of causation. The answer to this submission is that the “but for” test is not the exclusive test for causation. The judge approached the issue of causation, as he was entitled to do, as essentially a practical matter of common sense and in doing so made proper use of the medical evidence and the evidence of Mr Nikolich himself.

67 A complication of the causation issue arises from the fact that the trial judge found that the respondent’s injury was caused by the breach of three terms of the contract, two of which I would hold not to be terms at all. This raises a question of concurrent causes. It does

so in rather unusual circumstances.

68 It is well established that damage may be “caused” by a breach notwithstanding the presence of other concurrent causes: *Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322, 346. It would be open, therefore, to conclude that Mr Nikolich’s injury was “caused”, in the legal sense, by the breach of the Health and Safety term even though this was only one of three causative breaches found by the trial judge. It might be thought, however, that since causation is a question of fact to be determined as a matter of common sense, that the matter should be remitted to the primary judge for that issue to be decided. In the present case, this problem does not arise because the actions and omissions that were found to be breaches of the two rejected terms were themselves breaches of the Health and Safety term. As steps provided for or contemplated by the firm’s own manual, WWU, they could not sensibly be said to be other than practicable at least in concept, and there was nothing in the facts found by the primary judge to suggest that, in the circumstances of this particular case, they were not practicable.

69 It may be that the respondent’s particular psychological profile and his disappointment at the reallocation decision also contributed to the factual matrix which resulted in his injury but the possibility in this respect that the appellant’s breaches were not the sole cause of the respondent’s damage is no barrier to liability.

REMOTENESS

70 The appellant argued that the primary judge erred in failing to conclude that the psychiatric injury suffered by the respondent was too remote to sound in damages. It says that to have found otherwise “effectively overturn[s] the principle that damages are not available for disappointment and distress in breach of contract cases.” In support of this “principle”, the appellant cited the judgment of Spigelman CJ in *State of New South Wales v Paige* (2002) 60 NSWLR 371, [132] – [139]. *Paige*, however, was a negligence case in which the Chief Justice was concerned with psychiatric injury (not mere disappointment and distress) resulting from the manner in which an employee was dismissed. His Honour referred to the decision of the House of Lords in *Johnson v Unisys* [2003] 1 AC 518, in which their Lordships had denied liability in both contract and tort for psychiatric injury arising from the manner of an employee’s dismissal. The Chief Justice explained that the earlier House of

Lords decision in *Malik v BCCI* [1998] AC 20, where there was recovery for injury to reputation caused by an employer's breach of an implied term in the employment contract, was distinguished in *Johnson* on the basis that the earlier case "was not a manner of dismissal case." This case is distinguishable from *Paige* for precisely the same reason.

71 Mere disappointment and distress do not ordinarily sound in damages but the primary judge considered it to be "strongly arguable" that the present case came within the exception to that rule expressed in *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 because, he said, the "very object" of the relevant promises in WWU was to provide peace of mind. As there was no suggestion, however, that the respondent was merely disappointed or distressed, it was unnecessary for the primary judge to reach a final view on this issue. It was unchallenged, at least on appeal, that the respondent had suffered a psychiatric injury. The appellant's reliance on *Paige* is misplaced.

72 Damages may be awarded for psychiatric injury caused by a breach of contract, including a breach of a contract of employment: *Gogay v Hertfordshire County Council* [2000] IRLR 703 (Court of Appeal, Hale LJ with whom May and Peter Gibson LJJ agreed); see also *Johnson*, where this appears to have been assumed by the House of Lords. Given the content of the terms implied in employment contracts by the common law and their close – if not complete – correlation in relevant respects with the duty of care in tort, it would have been anomalous had damages been unavailable for psychiatric injury caused by a breach of an employment contract when they undoubtedly would be available in tort: see *Koehler v Cerebos* (2005) 222 CLR 44; *Barber v Somerset County Council* [2004] 1 WLR 1089. I would add that there is no novelty in the proposition that damages may be awarded against an employer whose failure to respond appropriately to bullying or harassment in the workplace causes psychiatric injury to an employee: see *Naidu v Group 4 Securitas* [2005] NSWSC 618 (contract); *Waters v Commissioner of Police of The Metropolis* [2000] 1 WLR 1607 (see especially per Lord Hutton at 1615 – 1616 where his Lordship observed that the relevant duty arises both under the contract of employment and under the common law principles of negligence); *New South Wales v Mannall* [2005] NSWCA 367 (negligence).

73 The appellant's other contention about remoteness was that the primary judge had found that only distress (which is not an injury that ordinarily sounds in damages) was

foreseeable as the result of the appellant's breach and not psychiatric injury (which is). Therefore, it said, the primary judge should have held that the psychiatric injury which the respondent suffered was too remote.

74 The relevant passage of the primary judge's reasons only need be set out to see the error of this submission:

"It must be taken to have been within the contemplation of the parties that, if the obligations were not fulfilled, the particular employee to whom the obligations were owed might become upset, stressed and disturbed. It is notorious that stress and disturbance of mind may lead to a psychological disability. It may be unusual for disturbance of mind to lead to a psychological condition as severe as that suffered by Mr Nikolich; there is no evidence on the point. However, that is a statement about the extent of the injury, not its type. This is not a case, as in Rowe v McCartney, of a mental disability arising out of irrational guilt feelings that had only a tenuous connection with the plaintiff's cause of action. This is a case of a mental disability that was a particularly severe manifestation of the very type of detriment that the WWU promises were designed to prevent." (Emphasis added).

75 It is thus evident that the primary judge did consider that psychological injury was a foreseeable consequence of the appellant's failure to fulfil its obligations as set out in WWU.

DAMAGES

76 Other than the submission about remoteness, discussed in the preceding paragraphs, the appellant did not dispute the primary judge's findings as to damages.

77 I should note, however, that the trial judge made an unusual order to take into account the circumstance of the case that Mr Nikolich's condition, and the disability consequent upon it, was likely to be prolonged by a continuation of the litigation. His Honour referred to the medical reports that suggested "a lack of resolution of [Mr Nikolich's] grievance has hindered [his] ability to recover and thus be fit for work".

78 His Honour took into account the possibility that there might be an appeal with consequential further delay, which he assessed to be probably about six months. He allowed for this possibility by adding a further \$50,000 to his assessment of damages for loss of future income. The course his Honour took, which he recognised was unusual, was to add a proviso

to his orders that the further \$50,000 was not to be payable if GSJBW did not file a notice of appeal and satisfied the judgment within 28 days. Thus, the order actually made by his Honour was for judgment for the full amount of general damages assessed with the proviso that, if no notice of appeal was filed and the lesser sum of \$465,869 was paid to Mr Nikolich within 28 days, that payment should be taken as full payment of the judgment sum.

79 A notice of appeal having been filed, the proviso to his Honour's order had no operation. The parties were nevertheless in agreement that the proviso should be set aside. His Honour, a judge of very great experience, fashioned his order in the way he considered best calculated to do justice to both parties in the particular circumstances of the case. He made it clear that it was not his intention to frustrate GSJBW's right of appeal but that he was recognising the reality in these cases that recovery is often assisted by the resolution of the underlying controversy between the parties.

80 Both parties submitted that his Honour's order ought to be varied by deleting the proviso. The appellant offered no argument as to why the proviso was erroneous in principle and the respondent offered no argument in defence of it. Since the filing of the notice of appeal meant that the proviso had no effect in reducing the amount otherwise payable, questions about it are necessarily hypothetical and I am not persuaded that, on appeal, any order should be made setting it aside. It would be inappropriate in the present circumstances to express any view as to the correctness or otherwise of the approach taken by his Honour.

COSTS OF THE TRIAL

81 The appellant argued that the primary judge erred in awarding costs to the respondent because the proceedings were brought under s 170CP of the WRA and were thus subject to the 'no-costs' provision of s 170CS.

82 Section 170CP, as it then was, was contained within Subdivision C of Division 3 of Part VIA of the Act. (See now s 663 which is found in Subdivision C of Division 4 of Part 12.) Subdivision C prohibited the determination of an employee's employment on certain grounds and made provision for remedies including, through s 170CP, remedies in the Federal Court. Applications under s 170CP and its successor are, of their nature, generally pursued by an employee. The remedial orders that a Court may make were provided for by

s 170CR (see now s 665).

83 Section 170CS (see now s 666) provided for a special “no-costs” regime, confined in its operation to a proceeding brought under s 170CP. The section provided:

“170CS Costs

(1) Subject to this section, a party to a proceeding under section 170CP must not be ordered to pay costs incurred by any other party to the proceeding unless the court hearing the matter is satisfied that the first-mentioned party:

- (a) instituted the proceeding vexatiously or without reasonable cause; or*
- (b) caused the costs to be incurred by that other party because of an unreasonable act or omission of the first-mentioned party in connection with the conduct of the proceeding.*

(2) Subsection (1) does not empower a court to award costs in circumstances specified in that subsection if the court does not have the power to do so.

(3) In this section:

costs *includes all legal and professional costs and disbursements and expenses of witnesses.”*

84 There is no suggestion that sub-sections (a) or (b) of s 170CS(1) were applicable here.

85 The respondent’s proceeding was brought, in part, under s 170CP. In awarding costs to the respondent the trial judge made no reference in his reasons to s 170CS and the question on appeal is whether such an order was precluded by the section even though Mr Nikolich’s claim had three quite distinct bases, only one of which was s 170CP.

86 The WRA, as it then was, also had a general “no costs” provision. This was s 347 (see now s 824), a provision with a long history: there was a comparable provision in s 347(1) of the *Industrial Relations Act 1988* (Cth) and earlier in s 197A of the *Conciliation and Arbitration Act 1904* (Cth). It is well settled that s 347 (and now s 824) of the WRA limits the award of costs not only in respect of a claim brought in reliance upon the WRA but also in respect of other claims joined in the same proceeding, including common law claims in the accrued jurisdiction of the Court. The authorities were collected and discussed by Nicholson J in *Maritime Union of Australia v Geraldton Port Authority* [2000] FCA 16.

87 The decisions about the application of s 347 in circumstances where a proceeding

includes a claim made otherwise than “under” the WRA turn to a large extent upon the reference in s 347 to “a matter arising” under the WRA. Thus it was argued by the respondent that “a proceeding under” s 170CP is a narrower concept than “a proceeding in a matter” under the Act, particularly if “matter” is used in its constitutional sense. This may be accepted and it is a point of distinction between s 347 and its more specific counterpart in the “termination of employment” division of Part VIA of the WRA.

88 It would, of course, be anomalous if different principles in relation to multiple causes of action applied in the application of s 347(1) on the one hand and its more specific counterpart in s 170CS on the other. The anomaly might seem all the greater if, as may well be the case, the narrower language of s 170CS simply reflects the fact that this provision was drafted in terms to embrace one specific section of the WRA and not, as with s 347, every type of proceeding that might be brought under the Act and, on the authorities, more.

89 The question is whether in a proceeding founded on multiple causes of action, of which s 170CP is only one, the expression “a proceeding under s 170CP” refers to the whole of the proceeding or only to that “part” of the proceeding that is brought pursuant to the provision.

90 The answer, as a matter of language, is not clear but the question can be resolved by appropriate reference to the objects of the relevant provisions.

91 The policy debate about the respective merits of regimes in which costs follow the event and ‘no-costs’ regimes is wide ranging and of long-standing. In relation to s 170CS in its application to s 170CP, the reason for the policy choice in favour of a no-costs regime seems plain enough. Section 170CP(1) gave a right to apply to the Court to an employee who claims to have been the subject of an unlawful termination of employment. In some circumstances, an inspector, a trade union or a trade union officer could apply under s 170CP in respect of an alleged contravention but the primary focus was upon the employee.

92 The application of a ‘no-costs’ regime in such circumstances suggests that the object was to facilitate the exercise of an employee’s right to apply for an order under s 170CR in respect of an alleged contravention. Without the threat of a potentially disabling cost penalty, an employee may feel better able to assert the rights given to him or her by the WRA.

93 It is not difficult to envisage circumstances in which an employee might bring proceedings in the Federal Court consequent upon the termination of employment in which causes of action in addition to those arising under the unlawful termination provisions of the WRA might be relied upon. Consistently with the broad policy of litigation that multiple proceedings relating to the one matter are to be avoided, there is good reason to conclude that the overall policy of s 170CS would be advanced by interpreting that section in the same way as s 347 has been interpreted in its broader context. It would be a very strange result if a person whose employment had been terminated unlawfully would be protected from an adverse costs order by s 170CS in a proceeding not instituted vexatiously or without reasonable cause, and yet would be deprived of that protection if, perfectly reasonably, a related common law claim in the accrued jurisdiction of the Court were joined in the same proceeding.

94 I therefore conclude that the object of s 170CS would be advanced by giving it the same operation as s 347, such that the whole of a proceeding of the present character is to be characterised as a proceeding under s 170CP. The circumstance that this might possibly permit a colourable application under s 170CP for the purpose of providing a protective cloak over a common law action does not point against this conclusion. Abuses of that nature do not appear to have emerged in relation to s 347 and, in any case, improperly joined proceedings can be severed and there may also be potential for the operation of the provisos.

95 In these circumstances, I conclude that the learned primary judge was in error in awarding costs in favour of Mr Nikolich. Although the 'no-costs' regime in Division 3 had a policy objective that primarily favoured the rights of employees, it naturally worked both ways so that an employer who was a party to a proceeding within a no costs regime likewise had the benefit of it. GSJBW was such a party.

COSTS OF THE APPEAL

96 I agree with the analysis by Jessup J of the application of s 170CS and s 347 to this appeal. Since I would allow the appeal only to the extent that it relates to the award of costs, I would order that 90% of the respondent's costs of the appeal be paid by the appellant.

CONCLUSION

97 The trial judge was correct in concluding that WWU contained a term of the contract of employment that the appellant would take every practicable step to provide and maintain a safe and healthy work environment for its employees, including Mr Nikolich, that the appellant was in breach of that term, that the breach was a cause of Mr Nikolich's injury and that he was entitled to damages for the breach.

98 The appeal should be allowed as to costs but should otherwise be dismissed. The orders I would make are that:

1. The appeal be allowed in part.
2. Order 3 made by the trial judge on 23 June 2006 be set aside.
3. The appeal be otherwise dismissed.
4. The appellant pay 90% of the respondent's costs of the appeal.

I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black.

Associate:

Dated: 7 August 2007

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 1361 OF 2006

**ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF
AUSTRALIA**

**BETWEEN: GOLDMAN SACHS JBWERE SERVICES PTY LIMITED
 Appellant**

**AND: PETER NIKOLICH
 Respondent**

JUDGES: BLACK CJ, MARSHALL & JESSUP JJ

DATE: 7 AUGUST 2007

PLACE: SYDNEY

REASONS FOR JUDGMENT

MARSHALL J

99 Peter Nikolich worked for Goldman Sachs JBWere Services Pty Limited (Goldman),
formerly Were Holdings Limited, as an Associate Investment Adviser and an Investment
Adviser from May 2000 until December 2004. In December 2004, Goldman terminated
Mr Nikolich's employment because it considered that he did not intend to, or was not able to,
return to work in the foreseeable future or at all. Mr Nikolich had been absent from work as a
consequence of a psychological injury incurred in his employment.

100 This appeal raises for consideration the issue of whether Goldman breached the
contract of employment between it and Mr Nikolich by reference to provisions contained in a
document given to Mr Nikolich by Goldman when it sent to him his letter of offer of
employment.

101 A few months after the termination of Mr Nikolich's employment, he commenced a
proceeding in this Court claiming that Goldman had terminated his employment in
contravention of s 170CK(2)(f) of the *Workplace Relations Act 1996* (Cth) (WR Act), as it
then stood.

102 Mr Nikolich amended his application to rely on grounds in addition to the

contravention of the WR Act. He claimed further that Goldman had:

- breached ss 52 and/or 53B of the Trade Practices Act 1974 (Cth); and/or
- made negligent misstatements; and
- breached the contract of employment.

103 His Honour Justice Wilcox heard the matter at first instance (see *Nikolich v Goldman Sachs JB Were Services Pty Limited* [2006] FCA 784). His Honour dismissed Mr Nikolich's claims, other than an aspect of the breach of contract claim. His Honour awarded damages to Mr Nikolich, who he considered suffered a major depressive disorder as a consequence of "the events the subject of the proceeding". Goldman now appeals from that order.

104 His Honour found that a breach of contract arose from Goldman's failure to comply with the promises made by it to its employees, including Mr Nikolich, in a document titled "Working With Us" (WWU). His Honour found that Mr Nikolich received a copy of WWU when he received his letter of offer of employment in May 2000 and that Goldman required him to familiarise himself with its terms.

105 Justice Wilcox considered at [247] of his reasons for judgment that "the explicit promises made in WWU by [Goldman] should be regarded as express terms of Mr Nikolich's contract of employment". His Honour considered the real issue to be "whether [Goldman] has incurred any contractually binding obligation as a result of the provisions concerning behavioural standards [found in WWU]".

106 At [248], Justice Wilcox determined that issue in Mr Nikolich's favour. His Honour said:

It is clear that [Goldman] was concerned to insist that all its employees...would comply with those behavioural standards, which it trumpeted as reflecting the firm's values and culture.

His Honour said further:

...as the document appears to impose legal obligations on [Goldman] in relation to other matters, I see no reason to doubt that it also does so in

relation to those provisions of the document that contain express promises about behavioural standards.

His Honour then said he considered that Goldman:

...may be held liable in breach of contract where it can be shown that, on no view of its conduct, has it responded to a problem or a complaint in the manner promised or assumed in a particular WWU provision.

107 Justice Wilcox then considered whether Mr Nikolich had established the four alleged breaches of obligations imposed on Goldman by WWU. He held that one of them, “the conflict of interest clause”, did not give rise to an entitlement to damages. His Honour concluded that Goldman had breached its contract with Mr Nikolich in respect of other provisions in WWU relating to health and safety, harassment and grievance procedures.

EXPRESS INCORPORATION

108 Paragraph 8A of the second amended statement of claim raised the issue of whether certain provisions of WWU were express terms of Mr Nikolich’s employment contract. It alleged:

It was an express term of the Applicant’s contract of employment and subsequent promotions that the Respondent would not, by its servants or agents treat the Applicant other than in accordance with the Respondent’s policies as amended from time to time including the Respondent’s document headed “Working With Us”.

109 In paragraph 10 of the second amended defence, the respondent said that Mr Nikolich was required to comply with the policies and procedures set out in WWU but that WWU did not constitute a term or condition of his contract of employment. Goldman acknowledged that Mr Nikolich was given a copy of WWU when it offered him employment and that he was asked to “sign off on” specific policies and procedures contained in WWU. Goldman said it did not ask him to “sign off on the document itself” and that WWU expressly states that Goldman reserves the right to change the information contained in it from time to time.

110 Justice Wilcox found at [228] that when Mr Nikolich received Goldman’s offer of employment, it also provided him with several documents including a 119 page document called “Working With Us”. Mr Nikolich signed and returned a copy of the letter containing

the offer of employment. He was not required to sign a copy of WWU. The letter included at least some of the terms of Mr Nikolich's employment.

111 At [213] to [249] of his Honour's reasons for judgment, Wilcox J dealt with the issue of primary importance on this appeal.

112 Justice Wilcox set out excerpts from WWU headed "Conflict of Interest", "Harassment" and "Integrity". His Honour also referred to other sections of WWU in which, as his Honour said at [214], "there are statements about treating people (including other employees) with respect, and behaving in a non-aggressive, courteous and non-discriminatory manner".

113 At [215] his Honour referred to the largest chapter in WWU (41 pages) containing what he described as "the support package".

114 He referred to various sections of the chapter which "[set] out employees' entitlements in relation to the relevant area of support". He also noted that:

The section on personal time contains provisions about leave that are routinely covered by formal contracts of employment or industrial awards; for example, annual leave, long service leave, [and] overtime payments in lieu of public holidays.

115 Justice Wilcox, at [223], rejected the submission that WWU was "simply a manifestation of [Goldman's] right to issue lawful and reasonable directions to its employees...and the corresponding obligation of employees to comply with such directions". His Honour observed that the document did more than set out directions to Goldman employees. His Honour said:

It contained numerous provisions that purported to be promises made by [Goldman] or that purported to grant specific entitlements to employees. Many of these provisions related to matters that one would normally expect to find covered by a contract of employment.

116 At [234], Wilcox J referred to *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 (*Riverwood*) where, by majority, a Full Court confirmed a judgment of the trial judge, Weinberg J, that a "Human Resources Policies and Procedures

Manual” bound an employer to provide a former employee with redundancy benefits.

117 After previously referring to passages from the majority judgments, Wilcox J said at
[246]:

In *Riverwood*, the relevant term of the employment agreement was that the employee would “abide by” the policies and practices contained in a secondary document. In the present case, the relevant term of the employment agreement was that [Goldman] “will expect” Mr Nikolich to “comply as applicable” with presently-existing and future “office memoranda and instructions”. There is not much difference between the wording of the two terms. Also, in both cases, the relevant secondary document clearly purported to impose obligations on the employer, some, at least, of which are obligations customarily found in employment contracts and which would otherwise be absent from the employment contract. Accordingly, it seems to me that the approach taken in *Riverwood* has application to this case.

118 As Weinberg J, at first instance, said in *McCormick v Riverwood International (Australia) Pty Ltd* (1999) 167 ALR 689 at [78]: “(t)he actual terms of a contract are those which the parties intended to incorporate in that contract”.

119 The central question on this aspect of the appeal is whether the parties intended to incorporate into their contract some or all of the matters dealt with in WWU.

120 The conclusion of Wilcox J on the topic of express incorporation of WWU into the contract is compelling, for the following reasons:

- WWU formed part of the “office memoranda and instructions” which Mr Nikolich’s letter of offer of employment said would be issued and with which he would be expected to comply as applicable. Goldman gave him no other document which may be described as “General Instructions” within the context of the letter of offer;
- Mr Nikolich was required to read WWU and sign some forms contained within it, some of which covered the topics on which Wilcox J made findings, such as the Health and Safety Statement; and
- WWU provided entitlements to employees in addition to setting out directions to them. It sets out what each of the parties could expect the other to do, during its

subsistence, in respect of a broad range of matters.

121 The fact that Goldman required Mr Nikolich to sign forms acknowledging some of the provisions of WWU does not weigh against the parties' intention to incorporate other provisions of WWU, in relation to which forms of acknowledgment were not signed by Mr Nikolich, into the contract of employment. The "Forms of Acknowledgement" signed by Mr Nikolich related to the "Cash Transaction Reports Act 1988", "Employee Electronic Communications and E-mail Protocol Agreement", "Health and Safety Statement", "Staff Transactions and Transactions for Employees Of Another Broker – Client Records Copy", "Consent to Transfer of Payroll Details" and "Proper Authorities" provisions of WWU. These provisions largely relate to obligations imposed on Goldman and Mr Nikolich by various statutes. As such, it is understandable that Goldman singled out those provisions of WWU for specific acknowledgment by Mr Nikolich. However, that does not change my view that the parties intended to incorporate other provisions of WWU into the contract of employment. I compare this situation with the situation in *Riverwood*: it is clear that in *Riverwood* the redundancy policy did not need to be signed by the employee for it to be incorporated expressly into the employment contract and no such requirement should be imposed on Mr Nikolich in the present case.

122 Further, the fact that Goldman could vary WWU unilaterally from time to time does not mean that it did not intend to be bound by the terms of the document in whatever form it existed during the currency of Mr Nikolich's employment. As Mansfield J observed in *Riverwood* 177 ALR 193 at [152], Goldman's power to vary the document "would be constrained by an implied term that it would act with due regard for the purposes of the contract of employment...so that it could not act capriciously, and arguably could not act unfairly towards [the employee]".

123 It is therefore erroneous to suggest that Goldman is not free to change any matters referred to in WWU without the consent of all of its employees. In this regard, counsel for Goldman relied on the dicta of Kitto J in *Thorby v Goldberg* (1965) 112 CLR 597 (*Thorby*) at 605. There, Kitto J referred to the case of *Loftus v Roberts* (1902) 18 TLR 532 (*Loftus*) which he said:

...decides only that where words which by themselves constitute a promise

are accompanied by words which show that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought.

Justice Kitto then said: “(s)uch a situation does not exist in the present case”.

124 The same can be said of this case. Unlike *Loftus*, Goldman was obliged to adhere to its obligations under WWU so long as it had them. It was open to Goldman under WWU to vary any particular part of the document, then that revised provision would have effect, subject to the matters raised by Mansfield J in *Riverwood* 177 ALR 193 at [152]. As Kitto J said in *Thorby* 112 CLR at 603:

It is only where future agreement is required in order that the agreed provisions and those to be agreed shall operate together as one contract that the agreed provisions cannot be treated as themselves constituting a contract.

Here, WWU constitutes an agreement. It does comprehend further agreements to vary it, but variation may occur to its terms and the varied terms will then operate with effect from that date of variation, subject to considerations of fairness and the like.

125 *Loftus* concerned a case where an actor alleged breach of contract against a producer. Lord Justice Vaughan Williams at 535, considered that the arrangement between an actor and a producer of a play “did not amount to an enforceable contract”. The producer had an option not to engage the actor by not bringing the play to the West End of London. The actor had an option not to perform unless an agreement could be reached on her salary. That type of factual situation is far removed from the present context. Mr Nikolich never had an option not to comply with any part of WWU which placed obligations on him, nor did Goldman, in the absence of any change to any particular obligation or entitlement referable to it.

126 Counsel for Goldman submitted that “the written contract of employment on its face appeared to be a comprehensive statement of the obligations being assumed by each party”. That is wrong. The contract refers to some conditions of employment but also to other matters such as “incentive schemes”, “instructions and memoranda” and “material policies”.

127 Counsel for Goldman also submitted that the written letter of offer of employment does not in terms refer to WWU. However, it does refer to “instructions and memoranda”

which I consider encompasses WWU, a document which contains instructions and memoranda on various issues. Counsel noted that Mr Nikolich did not sign a copy of WWU. That is of no consequence: he was required to read it and sign certain forms contained in it. The conclusion I draw from this action is that Goldman was making Mr Nikolich aware that the document applied to his employment.

128 Justice Wilcox erred, it was contended by Goldman's counsel, because his Honour relied on the subjective intention of Mr Nikolich and Goldman's managerial employees concerning the status of WWU. His Honour made an observation to that effect, couched with the introductory words, "for such relevance as it may have". Justice Wilcox determined independently, and by objective analysis, that WWU was intended by the parties to form part of the contract, in so far as WWU placed obligations on, and provided benefits for, either party to the contract.

129 It was also submitted by counsel for Goldman that Wilcox J relied on unproven custom in holding that many of the provisions contained in WWU were ones which would normally be found in a contract of employment. That is a false issue: either the provisions of WWU were incorporated in the contract of employment by the objective intention of the parties or they were not.

130 Another false issue raised by counsel for Goldman concerns Wilcox J's alleged failure to identify "a secure basis for incorporation" of WWU into the employment contract. Again, that is not an issue because the parties either intended to incorporate WWU or they did not. As *Riverwood* shows, such an agreement is plainly capable of being so incorporated.

131 To avoid *Riverwood*, counsel for Goldman sought to distinguish it on the basis that, in *Riverwood*, the employee agreed to "abide by all company policies and practices currently in place" while, here, Mr Nikolich was expected to comply with office memoranda and instructions as applicable. This is a question of a distinction without a difference and is called in aid of the incorrect submission that WWU only places obligations on employees.

132 Counsel for Goldman submitted that Wilcox J erred in construing the relevant obligations as other than indications of Goldman's general philosophy and approach to dealing with its staff. This is tantamount to saying that the statements by Goldman were not

intended to be taken seriously - then why commit them to paper and parade them as Goldman's way? This submission must be rejected.

133 I also reject the challenge by Goldman's counsel to Wilcox J's alleged lack of precision in identifying which portions of WWU formed part of the contract of employment. Only those portions which impose obligations or confer entitlements could form part of the contract. Otherwise, the parties are not agreeing to do anything which would have consequences. The critical point here is that the clauses in WWU which Wilcox J found that Goldman had breached were clauses which imposed obligations on it and formed part of its contract of employment with Mr Nikolich.

134 Finally, counsel for Goldman submitted that his Honour erred in regarding the language in WWU as promissory because the terms which Wilcox J found to be incorporated into the contract of employment were "not sufficiently certain...too vague and general or otherwise inherently unsuited to become terms of a contractual nature". No authority is cited to support this proposition. As Wilcox J said at [223] the logical consequence of such a submission is that WWU is "misleading" or a "cruel hoax".

135 On the basis that the provisions of WWU dealing with health and safety, harassment and grievance handling procedures were terms of the employment contract, Goldman submitted that Wilcox J should have found no breach of these terms had occurred.

BREACH

Health and safety

136 Justice Wilcox found that Goldman breached its obligation to:

...take every practicable step to provide and maintain a safe and healthy work environment.

His Honour also found that Goldman had breached its duty to:

...provide and maintain, so far as is practicable, a working environment that is safe and without risk to health.

137 The second duty referred to in the preceding paragraph is not materially distinguishable from the first. The full text of the relevant sentence commences with the

words “the firm has a duty to provide”. This sentence recognises a pre-existing duty emanating from health and safety legislation such as the *Occupational Health and Safety Act 1989* (ACT) and is not in the nature of a binding undertaking.

138 The question arises: did Goldman fail to take every practicable step to provide and maintain a safe and healthy work environment for Mr Nikolich?

139 Justice Wilcox at [274] agreed with the submission of counsel for Mr Nikolich that Goldman breached its health and safety obligations “by reason of the failures and omissions of Ms Jowett”. That submission said:

Despite the fact that Ms Jowett had been put on notice of potentially injurious conduct by Mr Sutherland and the effect that it was having on [Mr Nikolich], no steps at all were taken which would satisfy the relevant occupational health and safety procedures laid down in a “Working With Us” document.

140 The obligation to take every practicable step to provide and maintain a safe and healthy work environment is not governed by any prescribed procedures. Breach of the grievance procedures elsewhere in WWU is a separate issue.

141 Justice Wilcox at [275] considered that Ms Jowett and Mr Heath should have acted with greater urgency in the following respects:

- “to investigate and resolve the issues raised by Mr Nikolich”;
- “to reverse any inappropriate decision that had been made by Mr Sutherland”;
- “to take action to effect a reconciliation between [Mr Sutherland and Mr Nikolich]”;
and/or
- “if it was appropriate, to terminate Mr Sutherland’s supervision of Mr Nikolich’s activities”.

142 His Honour said at [275]:

An employer who took seriously its obligation to “take every practicable step to provide and maintain a safe and healthy work environment” would have done this. [Goldman] did not.

143 Mr Nikolich's problems at work stemmed from the resignation of his colleague, Ms Dal Bon, and a difference of opinion with his immediate supervisor, Mr Sutherland, about how Ms Dal Bon's clients should be reallocated within Goldman's Canberra office. Mr Nikolich became upset by what he saw as Mr Sutherland's unfair treatment of him and a co-worker, Mr Keogh. He decided to speak to Mr Heath, who was then Goldman's Manager of New South Wales' Private Clients.

144 Mr Nikolich and Mr Keogh telephoned Mr Heath on 25 June 2003. Mr Heath asked them to let him know later what they wanted him to do about the problem but said that he did not want to interfere with Mr Sutherland's right "to run the office".

145 Shortly after that phone call, as recounted by his Honour at [51], Mr Heath spoke to Mr Sutherland and was led to believe that "the issue [had] now been sorted out".

146 This, however, was not the case. On 8 July 2003, Mr Sutherland engaged in alleged intimidatory behaviour towards Mr Nikolich and Mr Keogh concerning client allocation and contact with clients. Mr Sutherland engaged in further alleged intimidatory conduct towards Mr Nikolich regarding the same issue on 10 July 2003.

147 On 28 July 2003, Mr Nikolich sent a formal complaint to the Human Resources section of Goldman about Mr Sutherland's conduct. The complaint reached Ms Jowett, Goldman's Sydney Human Resources Manager. Ms Jowett acted promptly to telephone Mr Nikolich and they discussed his concerns. Two days later, Ms Jowett telephoned Mr Nikolich "to see how he was".

148 On 27 August 2003, Ms Jowett discussed Mr Nikolich's concerns with Mr Sutherland and Mr Heath.

149 Justice Wilcox said at [70]:

Despite the fact that Ms Jowett now had Mr Sutherland's responses to Mr Nikolich's allegations, and Mr Heath's comment about the serious nature of the complaint, Ms Jowett took no immediate steps either to investigate the factual conflicts in the accounts given by Mr Nikolich and Mr Sutherland or, if she was not going to do this, to bring the "investigation" to a formal conclusion.

150 His Honour, at [70], refers to several telephone conversations in September 2003 between Ms Jowett and Mr Nikolich. During one of them, Mr Nikolich asked for “written confirmation of what you are doing to investigate my complaint”. In one of the conversations, Ms Jowett said that Mr Sutherland “is willing to apologise” but Mr Nikolich said he would “not accept any form of apology without restitution, that is Rod Sutherland reversing his decision about client reallocation”.

151 Ms Jowett called Mr Nikolich to a meeting with her and Mr Heath in Sydney on 15 October 2003. It was apparent by that time that Mr Sutherland was about to cease to be manager of the Canberra office. Mr Nikolich raised a fresh complaint about Mr Sutherland’s conduct regarding a particular client and discussed his original complaints. Ms Jowett followed up the fresh complaint.

152 On 1 December 2003, Ms Jowett sent Mr Nikolich her formal findings concerning his letter of complaint of 28 July 2003. Ms Jowett said that Mr Sutherland’s reallocation decisions “were appropriate having regard to the needs of the firm’s clients and the operations of the Canberra office”. The letter continued:

Although, I accept that you have felt distressed and upset on occasions as a result of the issues giving rise to your complaints, I am satisfied that Rod has not attempted to intimidate you or cause you stress during his discussions with you about the allocation of client accounts.

The letter also mentioned that Mr Sutherland “has stepped down from the position of Canberra Manager”. Ms Jowett also dealt with and rejected the additional complaint raised by Mr Nikolich.

153 On receipt of Ms Jowett’s letter, Mr Nikolich asked her to refer his complaint to Mr Evans and Ms Jacobs who was the Group Manager, Human Resources. Ms Jowett referred the complaint to Ms Jacobs. Mr Nikolich met with Ms Jacobs and Mr Evans on 17 March 2004. Discussion then ensued about possible financial compensation for Mr Nikolich, without resolution.

154 I was not initially persuaded that the history of Mr Nikolich’s dealings with Goldman management about his concerns regarding his treatment by Mr Sutherland shows that

Goldman breached its contractual obligation to take every practicable step to provide a safe and healthy work environment. In considering this issue, I have always had concerns about the fairness of the determination of Mr Nikolich's complaints, especially as to the conduct of Mr Sutherland. However, on the other hand, the complaint was investigated and resolved, albeit adversely to Mr Nikolich. There was no finding in the resolution of the complaint that Mr Sutherland had made an inappropriate decision and nor was there any finding to that effect by Wilcox J. Further, it is easy to say, with hindsight, that it may have been appropriate to terminate Mr Sutherland's supervision of Mr Nikolich's activities, but that was a difficult issue for Goldman management to resolve. It concerned matters going beyond Mr Nikolich's complaint and extended to the efficient operation of the entire Canberra office. In this context, the reference to "every practicable step" and "so far as is practicable" in the health and safety statement signifies a duty to take all reasonable care and provide, so far as an employer practicably could, in the circumstances, a safe work environment.

155 Goldman, acting through Ms Jowett and Mr Heath, did investigate and deal with Mr Nikolich's complaint. In doing so, Goldman attempted to balance Mr Nikolich's interests with the overall interests of Goldman's Canberra office. Ultimately, the issue was resolved adversely to Mr Nikolich and the result may seem unfair to a fair-minded independent observer. All of this tends to suggest that Goldman did take its obligation to provide and maintain a safe and healthy work environment seriously and applied it in Mr Nikolich's case in the context of his complaints. Nonetheless, I am persuaded by the Chief Justice at [43] to [51] of his Honour's reasons for judgment that Goldman breached the health and safety term of Mr Nikolich's employment contract.

156 I am so persuaded because Wilcox J's finding of breach was underpinned by his view that Ms Jowett and Mr Heath should have acted *with greater urgency* to deal with Mr Nikolich's complaint. Mr Nikolich lodged his complaint with Ms Jowett on 28 July 2003. He said he was anxious and stressed at that time. Mr Sutherland's supervision of Mr Nikolich was not terminated until some three months later and Ms Jowett's written response to Mr Nikolich's letter was not received by him until December 2003. That was far too long in the context of an employee who was severely disturbed by what he considered to be workplace bullying.

157 Although initially inclined to the view that Ms Jowett and Mr Heath did their best to balance the needs of the enterprise with the needs of Mr Nikolich, I am persuaded by the reasons of the Chief Justice that they took too long having regard to Mr Nikolich's delicate mental state at the time he made his complaint.

Harassment

158 The relevant portion of WWU which deals with "harassment" provides:

The [Goldman] culture and "family" approach means each person is able to work positively and is treated with respect and courtesy. It is within the context of our culture that all people within the [Goldman] team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated in any work related situation and where that reaction is reasonable in the circumstances.

The professional behaviour and conduct of each team member is important. It is a reflection of the person, the firm and our client service attitude. ...

159 The "harassment portion" of WWU does not, in terms, say that Goldman will not permit one of its employees to engage in intimidatory conduct against another. It is expressed in an aspirational sense. People in the "team" are called on to work together to avoid offensive conduct. This does not mean that offensive conduct may not be the subject of a complaint under a grievance procedure provided by WWU, but I do not read it as providing a contractual undertaking by Goldman that none of its employees will ever harass, humiliate or intimidate another. As in the general world, life in an office can be tough. Harassing, humiliating and intimidatory conduct should not be tolerated, but that is not the issue I have to consider. The issue for current determination is whether the harassment portion of WWU provides, in terms, a contractual obligation on Goldman's part, as alleged by Mr Nikolich. Based on the wording of this part of WWU, I do not consider that it does.

160 In the portion of WWU titled "sign-off forms for new JBWere team members and consultants to JBWere", under the heading "Procedures for harassment – concerns or complaints", the two paragraphs set out above at [158] are repeated, followed by:

The aims of our harassment procedures are to ensure:

- an environment free from harassment and its consequences;

- there are no reprisals for making a complaint;
- where disadvantage has occurred that it is redressed; and
- there is no misuse of power or trust if directed at a person who is unable to easily stop the conduct, or discuss the concern.

The guiding principles are:

- each member of the team is treated with courtesy and respect;
- help people stay with the firm and enjoy their time at work;
- observance of natural justice;
- observance of confidentiality;
- acceptance of the legitimacy of the feelings of the person with a complaint;
- support and protection for all people involved; and
- preservation of non-judgmental and non-adversarial approach.

There are then set out ten “steps in the complaints process”.

161 Counsel for Mr Nikolich submitted that the ten “steps in the complaints process”, when read together with the language surrounding them, impose on Goldman an obligation to deal with complaints of harassment “in this particular way”, that is, in the way set out in this portion of WWU. I do not agree. While the steps in the complaints process should be read in light of the language preceding them, this language does not assist Mr Nikolich: it is the language of “aims” and “guiding principles”, not of absolutes or guarantees. The language is plainly aspirational and there is no magic in it which turns the steps in the complaints process into a contractual obligation binding Goldman. It follows that no breach of contract arose with respect to this issue.

Grievance procedure

162 I agree with his Honour the Chief Justice’s reasons for judgment at [39] – [42] that the primary judge erred in concluding that the grievance procedure section of the WWU was contractual.

CAUSATION, REMOTENESS AND DAMAGES

163 I also agree with his Honour the Chief Justice’s reasons for judgment at [52] – [80] on the issues of causation, remoteness and damages.

COSTS

164 The proceeding before Wilcox J commenced as one under s 170CP of the WR Act. That Mr Nikolich later amended his application to include the other claims does not alter the fact that the proceeding was one under s 170CP.

165 It follows that Goldman, as a party to a proceeding under s 170CP, should not have been ordered to pay the costs of the proceeding below. It was not suggested that Mr Nikolich had incurred any costs by reason of any unreasonable act or omission by Goldman so as to enliven s 170CS(1)(b).

166 Consequently, no order should have been made for costs below and no order should be made now in respect of those costs. Each party will bear his or its costs of the proceeding at first instance. There is no dispute that the costs of the appeal, not being a proceeding under the WR Act, would ordinarily follow the event. As Goldman succeeded on appeal on the issue of the costs below, a fair resolution of the costs issue is for Mr Nikolich to be awarded ninety per cent of the costs of the appeal.

ORDER

167 I agree with the orders proposed by the Chief Justice at [98] of his Honour's reasons for judgment.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 7 August 2007

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD1361 OF 2006

**ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF
AUSTRALIA**

**BETWEEN: GOLDMAN SACHS JBWERE SERVICES PTY LIMITED
 Appellant**

**AND: PETER NIKOLICH
 Respondent**

JUDGE: BLACK CJ, MARSHALL & JESSUP JJ

DATE: 7 AUGUST 2007

PLACE: SYDNEY

REASONS FOR JUDGMENT

JESSUP J

168 This is an appeal from a judgment of the court given on 23 June 2006. The respondent had been employed by the appellant as an investment adviser, and was dismissed from that employment in December 2004. In proceedings originally commenced on 18 March 2005, the respondent alleged that his dismissal had been in contravention of s 170CK(2)(f) of the *Workplace Relations Act 1996* (Cth) (“the WR Act”) (as that provision was then numbered). The respondent alleged that certain conduct of the appellant during the course of his employ with it had been in breach of his contract of employment, and that other conduct involved misleading and deceptive representations contrary to ss 52 and 53B of the *Trade Practices Act 1974* (Cth) (“the TP Act”). The respondent claimed damages.

169 The trial Judge dismissed the respondent’s claims under the WR Act and under the TP Act. The respondent does not challenge those outcomes. His Honour also dismissed part of the respondent’s case in contract; and the respondent does not challenge that outcome. His Honour upheld other aspects of the respondent’s case in contract, and awarded him damages. It is against these parts of his Honour’s judgment that the present appeal has been brought.

BACKGROUND

170 The nature of the appellant's business was nowhere shortly stated – either in the considerable affidavit material relied upon at trial or in the reasons of the trial Judge. It was as though the appellant was well-enough known for that circumstance to be obvious. However, one may infer a little about the subject from a listing of the appellant's services which is set out in the first chapter of a substantial document produced by the appellant called "Working With Us" ("WWU") which was given to the respondent at the time he took up his employment. Some of those services are corporate advice, mergers and acquisition advice, underwriting, analysis and portfolio management, advising private clients as to their investments and superannuation and retirement planning.

171 On 15 May 2000 the respondent accepted a written offer of employment from the appellant dated 4 May 2000. He was initially employed as an associate investment adviser, but on 1 July 2001 he was upgraded to the position of investment adviser. In that role, he was required to provide investment advice to existing clients of the appellant, and to develop new client relationships. The respondent worked in the appellant's Canberra office, and reported to the Canberra branch manager, Rod Sutherland. The respondent received a base salary, together with incentive payments calculated by reference to the nature and extent of the fees which he earned for the appellant.

172 The terms of the contract which the trial Judge held the appellant had breached were established, according to his Honour, upon the respondent's acceptance of the appellant's offer of employment on 15 May 2000. There were two documents which were provided to the respondent at about that time: a formal letter of offer dated 4 May 2000 and WWU. The critical terms were in WWU. Although the appellant accepted that the terms of the letter of offer were contractual, it resisted the suggestion that the terms of WWU were contractual. His Honour held that they were, and that holding is challenged in this appeal. It will be necessary, therefore, to consider the terms of the letter and of WWU, and the circumstance in which those documents were provided to the respondent by the appellant and (in the case of the letter) executed by the respondent.

THE OFFER OF EMPLOYMENT

173 By its letter dated 4 May 2000, the appellant offered the respondent employment as an

associate investment adviser in its Canberra office. The letter opened by confirming the appellant's verbal offer of employment to the respondent in the position of associate investment adviser in the Canberra office. After a brief reference to the appellant's position in the finance and securities industry, the letter stated:

Upon commencement we will require your signature on our copy of this letter confirming your acceptance of the details and conditions of employment as outlined below.

The letter referred to the respondent's remuneration package and to the appellant's incentive schemes in which it was expected that the respondent would participate.

174 Under the heading "Employee Securities Investment and Transactions", the letter referred to, but did not set out in terms, a policy which the appellant had as to employees undertaking investments in their own names, and like transactions. The second paragraph under that heading read as follows:

All securities transactions for yourself and associates are to be processed through J B Were & Son. Stock Exchange regulations require that all financial securities transactions undertaken by employees of stockbroking organisations, and their associates, must be transacted through the employer organisation. You may not knowingly buy or sell securities for an employee or associate of another broker. You are required to read and sign the Company's Staff Transactions April 2000 Policy.

175 The next heading in the letter was "Intellectual Property and Duties of Confidentiality". Immediately beneath that heading, the following appears:

Your execution of and adherence to these terms is a condition of your employment with Were Holdings Limited. Terms are as follows:

It was provided that inventions, discoveries etc were to be the exclusive property of the appellant; that the respondent assigned to the appellant all proprietary rights, and similar rights, in any inventions; and that confidential information was to be delivered to the appellant immediately upon termination of employment. The letter then set out a number of restraints in connection with trade secrets, confidential information, and the like.

176 Under the heading "General Instructions" it was stated:

From time to time the Company has issued and will in the future issue office memoranda and instruments with which it will expect you to comply as applicable. If you have any queries at any time about which memoranda and instructions apply to you, you should raise that question with me or with Colin.

177 The letter was signed by the Human Resources Services Manager of the appellant. Beneath that again, there was provision for a counterpart of the letter to be signed by the respondent, by which he stated, in the printed terms of the letter: "I hereby accept your offer of employment as detailed in the above letter." The respondent signed that counterpart on 15 May 2000.

178 The trial Judge found that WWU was sent to the respondent by the appellant together with his letter of offer on 4 May 2000. In the appeal, there was some suggestion that the evidence may not have sustained such a finding, but, in its Second Amended Defence dated 7 April 2006, the appellant alleged that the respondent was given a copy of WWU when he was offered employment. In my view, the appellant should not be permitted to resile from this allegation, in which circumstances his Honour's finding in this respect must stand.

THE CONTENT OF "WORKING WITH US"

179 As its name suggests, WWU was a document which contained information about many aspects of employment within the appellant's organisation. Indeed, the opening chapter, entitled "Welcome to JBWere" concluded with the following paragraph:

We trust the following information will assist you in gaining an understanding of JBWere. We take an active personal interest in all our people and will make every effort to guide and direct your career aspirations towards a successful goal.

It would, however, be an oversimplification, and something of an inaccuracy, to say that WWU contained information only. It also contained statements of obligations which employees were expected to accept, rules with which employees were required to comply, advice and helpful suggestions for the assistance of employees and policies and procedures followed within the appellant's organisation of which employees were expected to be aware. Although WWU was provided to the respondent as a prospective new employee, it seems that it was also a document with which existing employees were expected to be familiar, and to

which existing employees might turn if in need of information about procedures, obligations etc from time to time.

180 WWU was amended from time to time as necessary. The version which was tendered in the proceeding before the trial Judge was marked “Version Number 9, May 2002”. If that version was introduced in May 2002, manifestly it was not the version that was sent to the respondent with his offer of employment in May 2000. The latter document was not in evidence. Rather, the parties conducted their cases on the basis that it would be safe to assume that the version of WWU which was sent to the respondent in May 2000 was relevantly indistinguishable from version 9. In any event, since this was a document of the appellant, not having put the earlier version of the document into evidence, it could not be heard to contend that that version was different from the one on which the respondent relied.

181 Although the trial Judge said that WWU contained “six substantive chapters”, there were ten chapters in the version sent to the respondent in May 2000. I have already referred to the first – “Welcome to JBWere”.

182 The next chapter (consisting of a single page) was entitled “JBWere Team Purpose – Culture in Practice. It contained a list of categories under which the appellant’s “culture” would, apparently, be given specific expression, namely, Client First, Market Driven, Innovation and Flexibility, Respect and Courtesy, One Team and Personal Leadership.

183 The next chapter (of 16 pages) was entitled “Overview of Our Main Services”. As the name suggests, the chapter was chiefly concerned to identify the kind of services which the appellant provided in the different sectors in which it operated.

184 The next chapter was a single page, entitled “Steps to Creating Client Value”. On this page was set out what were described as “Seven General Skills to Creating Client Value”. As a generalisation, those “skills” left the reader of WWU in no doubt but that the appellant placed the interests of its clients ahead of all other considerations. This was the “culture” of the organisation with which the respondent took up employment in May 2000.

185 The next chapter was entitled “Code of Conduct”. A general impression of the subjects covered by that chapter may be seen from a listing of the internal headings:

Chinese Walls
Confidentiality
Conflict of Interest
Electronic Mail and Internet Protocol
Employee Securities Transactions
Equal Employment Opportunity
Gifts
Harassment
Insider Trading
Integrity
Media Comments
Mobile Phones
Other Employment
Professional Conduct
Proper Authority
Protection of Intellectual Property
Taped Telephone Conversations
Welcoming Diversity & Preventing Discrimination
JBWere's Leaders on Diversity and Preventing Discrimination

His Honour referred to this chapter as containing “numerous rules to be followed by employees”. I would not regard everything in the chapter as properly described as “rules”. In many respects the chapter referred to what I would call standards of organisational behaviour and conduct which would find practical expression by way of instinctive and acquired behaviour patterns rather than by way of conscious obedience to specific “rules”.

186 Within this chapter, the following appeared under the heading “Conflict of Interest”:

It is important that you avoid any situation where personal interests may conflict with the interests of the firm or its clients. If you are involved in any financial, political or civic activities you are free to exercise your individual rights, but should avoid and conflict of interest between your outside activities and your position within the firm.

The following appeared under the heading “Harassment”:

The JBWere culture and ‘family’ approach means each person is able to work positively and is treated with respect and courtesy. It is within the context of our culture that all people within the JBWere team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated in any work related situation and where that reaction is reasonable in the circumstances.

The professional behaviour and conduct of each team member is important. It is a reflection of the person, the firm and our client service attitude. Further

information may be obtained by Human Resources.

The following appeared under the heading “Integrity”:

Integrity is a core value of the firm. It means we are open and honest, and we honour our obligations and commitments to each other, our clients, the people we do business with and the community. Always remember that you are a representative of the firm, therefore you cannot advise friends or social contacts without a proper authority.

If you feel that you are placed in a situation that makes you feel uncomfortable, consider asking yourself the following questions:

- | | |
|--|---|
| 1. Why is this bothering me? | Is it really an issue? |
| 2. Who else matters? | What are the implications for clients, the firm and other JBWere team members? |
| 3. Is it my responsibility? | Am I responsible or is someone else responsible for resolving the issue?
What will happen if I do not act? |
| 4. What is the ethical concern? | Is there a legal obligation? What are my values? What are the firm’s values? |
| 5. Whom can I ask for advice? | My associates, my manager, Human Resources? |
| 6. Am I being true to myself? | Is my action consistent with my basic values? With JBWere shared values?
Would I make the same decision if it concerned my family and friends? |

Often when you are aware of something that may require action, the best first step is for you to advise your Department Head, Branch Manger or General Manager.

Under the heading “Professional Conduct”, the following appeared:

Any group of people who have worked together for some time develop a philosophy or a series of traditions. You cannot describe it in numbers and statistics. In the real analysis, it is a spirit that stems from a belief that individuals in the firm want to do a good job, contribute to the success of the firm, and if provided with the proper environment will do so. But that’s only part of it. Closely coupled with this is, the fundamental principle of treating each person with courtesy and respect. Although we are aggressive in the market place, we are not aggressive with each other.

We feel that the professional behaviour and attitudes of our people is important. Positive relationships will only exist if people have faith in the motives and integrity of individuals and of the firm.

Remember to be calm, courteous and co-operative with clients and colleagues. Show courtesy or assistance to clients, guests or visitors in lifts, reception areas and passage ways. Be discrete and professional at all time – this includes not discussing business or eating/drinking in lifts, reception and public areas.

Professional conduct is also reflected in our language – it should be business-like and reflect our values of courtesy and respect.

It was then said that swearing was unacceptable behaviour in interactions both with clients and with fellow workers. There was a section headed “Welcoming Diversity and Preventing Discrimination”.

187 The next chapter in WWU was entitled “JBWere Team Support Package”. Of this chapter, the trial Judge said:

The largest chapter in WWU (41 pages) is that containing the support package. It is divided into eight sections: ‘Support for Career Management’, ‘Support for Ideas and Innovation’, ‘Support for Personal Time’, ‘Support for Health and Well-being’, ‘Support for Community Involvement’, ‘Support for Families’, ‘Support for Parents’ and ‘Support for Personal Issues’. Each of these sections sets out employees’ entitlements in relation to the relevant area of support. In some cases, the entitlement is stated in absolute terms, sometimes conditionally. The language is generally promissory: ‘we will ...’. The section on personal time contains provisions about leave that are routinely covered by formal contracts of employment or industrial awards; for example, annual leave, long service leave, overtime payments in lieu of public holidays.

188 The section headed “Support for Career Management” was divided into three subsections: “Support for Study”, “Support for Career” and “Support for Professional Development”. The subsection dealing with “Support for Study” set out the conditions under which the appellant will provide assistance for staff members to undertake further study (including the granting of study leave and exam leave), and associated matters. In this subsection there was language which was promissory, albeit used in the context of conditions and qualifications to which particular entitlements were subject. For example, there were such expressions as “the firm will reimburse” and “the firm is pleased to provide”. The subsection headed “Support for Career”, was less concerned with particular entitlements of

the employee in question. There is reference, for example, to an online career mentor program, and to a 12-months in-house professional development program. Employees were urged to consider issues which were critical to their retirement. The subsection headed "Support for Professional Development" contained details of the appellant's continuing professional development program. It dealt with industry accreditation, and said that the appellant would provide "financial assistance towards the cost of self-study kits and exam fees to gain accreditation". Here again the text used the expression "reimbursement is available". The subsection dealt with professional memberships, and noted that fees for one membership were "available to be reimbursed" to the employee.

189 There was a section in the chapter headed "Support for Ideas and Innovation". It referred to an intranet website which had a link "to help you showcase the best examples of creative thought and contribution". The reader was also informed that the appellant periodically conducted surveys "for us to seek feedback on your needs and expectations".

190 The section in the support package chapter headed "Support for Personal Time" specified a number of conventional employee entitlements, as well as some less conventional ones. It was said that a full-time permanent employee was "entitled" to 20 days' paid annual leave per year of service. The section also dealt with long service leave. It was said that the amount of long service leave varied from State to State, "but typically is as follows", with a typical scale of entitlements referred to. Sick leave was referred to. It was called an "entitlement", and the rate of accrual was mentioned. In relation to cultural and religious leave, the document said that the appellant was "pleased to be able to offer time" to participate in holy days "with three days' paid cultural/religious leave per year of service." Where an employee worked on public holidays, it was said that he or she "will be entitled" to a day in lieu. Likewise, if an employee carried out work on a weekend, it was said that the employee "may take an alternate day off in lieu". The document dealt with "moving house leave" and describes this as an entitlement. Finally, the section covered relocation leave and relocation assistance, and spoke in terms appropriate to entitlements.

191 The next section of this chapter was a significant one in the circumstances of the present case. It dealt with the subject of "Support for Health and Well-Being". The first subsection was headed "Health and Safety". Because of the importance of this subject, I

shall set out the whole of the text appearing under this sub-heading:

JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people. Prevention is the most effective health and safety principle. Through a shared responsibility, co-operation and support from all people, we will realise our health and safety objectives and create a safe work environment for ourselves and our team. Each member of the team has a duty to take the care for their own health and safety and of other team members affected by their actions.

JBWere offer the following health and safety programs: first aid, emergency procedures, return to work rehabilitation, employee assistance and a smoke free environment.

The health and safety of all people within JBWere is a shared responsibility of the firm, and each team member. In fulfilling this responsibility, the firm has a duty to provide and maintain, so far as is practicable, a working environment that is safe and without risk to health. The responsibility involves:

- Maintenance of the workplace in a condition that is safe and healthy
- Provision of adequate facilities to protect the welfare of all people
- Provision and maintenance of safe systems of work
- Provision of information and support to enable people to work in a safe and healthy manner.

JBWere's responsibilities

JBWere will ensure the effective implementation of health and safety procedures and observe its responsibilities under the Acts and Regulations which apply to the finance industry. This involves:

- Consultation with our people on relevant health and safety issues.
- Review of specific responsibilities so that they are consistent with the firm's health and safety objectives.
- Records maintenance of incidents and accidents so that health and safety standards can be monitored.
- Assistance and encouragement of rehabilitation following an injury or illness.
- Access to First Aid.
- Assistance with health care for overseas business travel and expatriates.

Responsibilities of JBWere Team Members

All team members of JBWere have a duty to take the care, of which they are capable, for their own health and safety and of other team members affected by their actions at work. To do this involves:

- Compliance with the firm's health and safety procedures and directions.
- Effectively support and use items or facilities provided in the interests of health, safety and welfare.
- Report potential and actual hazards.

- Store materials and equipment properly.
- Ask for assistance rather than risk an accident.
- Support rehabilitation processed through positive involvement.
- Provide details on personal medical conditions of which the firm should be aware.
- Take appropriate care and comply with procedures whilst on overseas business travel.

The firm is committed to regularly review these procedures as outlined in Health & Safety at JBWere, to ensure they operate effectively, and that changes to health and safety issues are reflected. The Group Manager – Human Resources, in conjunction with each Administration Manager, is responsible for this review.

Prevention is the most effective health and safety principle. Through a shared responsibility, co-operation and support from all people, we will realise our health and safety objectives and create a safe work environment for ourselves and the team.

192 This section of the chapter then dealt with emergencies, first-aid, the steps to be taken in the event of an accident, injury or illness, and with the appellant’s health awareness program. It was said that Human Resources were able to provide the employee with details on accessing the appellant’s web portal “for an up to date program outline, health tips, e-health talk and activity bookings.” The document then dealt with the subject of “safe return home after working late”, and provided that, in certain circumstances, the employee “may be eligible for a taxi voucher”. The document next dealt with the subject of potential health issues when employees travelled overseas or interstate, and made specific reference to steps that might be taken to avoid deep vein thrombosis.

193 The next chapter then proceeded to deal with “Support for Community Involvement” and “Support for Families”. Included in the matters covered in these sections were the leave to which employees would be entitled to enable them to participate in community organisations, such as the SES, and extending also to military reserve service leave and jury service leave. There were also details of leave available in circumstances where the employee was required to provide care or support for members of his or her immediate family.

194 The section of the document that dealt with the subject of “Support for Parents” contained a detailed and lengthy treatment of the circumstances in which an employee would

be entitled to parental leave. There was a section dealing with the subject of eligibility for parental leave which, according to the document, varied from State to State. In some places one finds the expression “we are pleased to offer”, thereafter referring to the kind of leave being dealt with. This section of the chapter dealt with the subject of how bonuses and incentives, normally payable during a period of the employee’s work, were dealt with during the time that the employee may be absent on leave of a kind for which the section made provision. There was a special note to the effect that they were “at the absolute discretion of the company and ... intended to encourage continued excellence of performance.” Under the heading “Continuity of Service” it was said that absence on parental leave did not affect continuity of service, but that annual, sick and long service leave entitlements would not accrue during any period of any unpaid absence by way of parental leave.

195 The final section in this chapter was entitled “Support for Personal Issues”. Under the first sub-heading, “Feeling Uncomfortable?”, the following appeared:

Sometimes clients, colleagues, managers or people we deal with, say or do things which make us feel uncomfortable, offended, humiliated, degraded or intimidated – and we don’t know how to prevent or deal with it.

Where to go for assistance

If you have doubts as to what is appropriate, or feel that you are placed in a situation that makes you feel uncomfortable, often the best first step is to talk it over with someone who can provide confidential advice and support. Some people who can do this are: Dianne Jacobs, Gina Jowett, Judith O’Leary or Paula Ward.

All initial discussions are confidential and may either be as a sounding board or you may simply ask for information and guidance as to your options.

We are committed to make sure that anyone who has a genuine concern will be supported, and the issue will be handled with discretion.

196 The next subsection was headed “Concerns or Grievances”. Under that sub-heading, the following appeared:

The door is wide open at all times for people to discuss any issue, not only with Department Heads, Directors, and Human Resources, but also with the Chairman. Such discussions are welcome as the firm has been built on the principle that it is a team with common interests and ideals. This interest extends beyond the range of career and business issues to more personal concerns.

Our culture means each member of the team is able to work positively and productively, and is treated with respect and courtesy.

If you feel you have a complaint or grievance (including any form of harassment) please contact the Group Manager – Human Resources or your Branch Manager. We are committed to make sure that anyone who makes a genuine complaint will be able to discuss the concern confidentially, will be supported by the firm and is not penalised in any way.

The JBWere ‘family’ way of operating and ‘help each other’ attitude exists because people have seen that it works, and they believe in it and support it.

197 There were subsections dealing with “Integrity”, and with “Privacy”, the latter of which covered such things as the collection, use and disclosure of personal information of employees. There was a cross reference to the part of WWU which dealt with diversity and the avoidance of discrimination, and a paragraph dealing with the Employee Assistance Program, under which the appellant provided some assistance for employees “faced with problems not directly associated with their role”, such as emotional stress, abuse, drug/alcohol problems or situational crises.

198 The next chapter was entitled “Reward Strategy”. The chapter dealt first with what was described as a “Total Reward Strategy”. It was said that the appellant used incentive schemes in which the employee was expected to participate, and in relation to which the employee “may benefit from any incentive payments which, at the company’s absolute discretion may be made during your employment.” There was a summary explanation of the objectives sought to be achieved by the appellant’s reward strategy. There was an explanation of items which were included in salary packages, such as superannuation (both compulsory and additional), life insurance, car parking, club subscriptions, motor vehicles and a number of items that, at the employee’s election, might be the subject of salary sacrifice. The chapter dealt with “Career Benefits”, referring to matters such as the payment of education fees, study leave, career development and retirement planning.

199 The chapter dealt with “Overtime” by setting out a series of circumstances under which “you are entitled to overtime”. There was a detailed specification of this entitlement. One of the entitling circumstances was that the annual base pay of the employee in question be less than \$37,000 per annum (which made the entitlement irrelevant to the respondent).

Under the heading “Superannuation” the reader was informed that all full and part-time team members must join the appellant’s superannuation fund.

200 The next chapter, headed “Additional Helpful Information”, contained a miscellany of information on such things as car parking arrangements, shower and change facilities, viruses on computer disks, photocopying, private dining rooms, public holidays observed by the appellant and the recruitment of members of families of existing staff. It dealt with questions of office security, and access to the buildings in which the appellant’s offices were located. It was said that the appellant was “a smoke-free work environment”, by which it was meant that staff were “not able to smoke” on the appellant’s premises. Standard office hours were referred to, together with the requirement to make entries in attendance sheets and other matters.

201 There was a single page, perhaps not strictly a chapter, headed “A Few Final Words...”. It contained a few paragraphs by way of exhortation to high standards and a fulfilling career.

202 Finally in WWU, there was a chapter headed “Sign-off Forms for New JBWere Team Members and Consultants to JBWere”. Under that heading, the following passage appeared:

The following pages contain important information necessary for your role. Please read carefully before signing the attachments contained within this booklet.

Beneath that, there appeared the following single line entries: Cash Transaction Reports; Chinese Walls; Email and Internet Protocol Agreement; Equal Opportunity and Preventing Harassment; First Aid Procedures; Health and Safety Statement; Insider Trading; and Staff Transactions. The “important information” to which the passage quoted above referred was set out under each of these headings. However, the “attachments contained within this booklet” were not part of WWU as tendered in the proceeding before the trial Judge. The corresponding forms actually signed by the respondent when he took up employment with the appellant are referred to below.

203 The first category of information was headed “Cash Transaction Reports Act 1988”. The text appears to explain to the reader what were his or her obligations under the legislation

referred to. The next information was contained under the heading “Chinese Walls”. The importance of these artefacts was referred to, and the appellant’s policies in relation thereto explained. The next section was headed “Employee Electronic Communications, Email and Internet Protocol Agreement”. In this section the appellant required employees to sign a protocol as to the use of the appellant’s email and internet facilities. The following paragraph appeared:

The firm regards adherence with this Protocol as absolute terms of your employment and to that end ask that you sign the acknowledgment and return it to the Human Resources department.

The text of the protocol to which employees were required to agree was set out, commencing as follows:

I understand that JBWere required this agreement, as part of the terms of my employment or contractor agreement, to ensure that JBWere’s workplace is kept free of inappropriate communications, conduct or images and inappropriate access to the Internet.

204 There was a page headed “Equal Employment Opportunity”, which referred to “the Affirmative Action Act”. The appellant’s equal employment opportunity policy was referred to.

205 There was a section headed “Procedures for Harassment – Concerns or Complaints”. The opening paragraph was as follows:

The JBWere culture and ‘family approach’ means each person is able to work positively and is treated with respect and courtesy. It is within the context of our culture that all people within the JBWere team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated, in any work related situation, and where that reaction is reasonable in the circumstances.

The aims and guiding principles of the appellant’s harassment procedures were set out. Some examples of harassment were given. It was said that, if the employee had a concern or complaint regarding harassment, certain procedures “have been put in place to ensure it will be handled in a fair and professional manner”. The procedures operated in a stepwise fashion, according to the following scheme:

Steps in the complaints process

1. You should tell the person concerned that the behaviour is unacceptable and that you are asking the person to stop. The person may not intend to offend and may not be aware of how you feel.

(If you cannot resolve the situation or feel unable to approach the person then the following steps are confidential.)

2. You should approach the contact person (your Branch Manager or Human Resources).
3. The contact person will listen, discuss options and assist you with the next step.
4. The contact person will approach Dianne Jacobs, Group Manager – Human Resources, who will listen, clarify the complaint, and provide you with information about the complaints process and available options.

(From this point, the complaint is not confidential in that the person complained about will be informed. The people involved may agree to have a support person at discussions or that witnesses will be contacted. The objective is to conciliate, investigate, make a finding on the substance of the claim and recommend appropriate action to the Chairman).

5. If you want to proceed, the person complained about is invited to make a response.
6. The response will be discussed with you. This may resolve the situation.
7. The Group Manager – Human resources attempts to arrange a resolution which is acceptable to both parties (through conciliation if that is appropriate).
8. If the matter is not resolved, you will be advised of the options, which will include referral to the Chairman.

(From this point it is likely that the matter will not remain confidential to the people involved, although the firm will endeavour to ensure that no person is advised of the subject matter of the complaint unless

9. If you have chosen to refer the complaint to the Chairman, the options of the Chairman are:
 - (a) existing internal disciplinary procedures; or
 - (b) use the services of an independent mediator from outside the firm who is acceptable to the person involved and whose recommendation will be implemented by the Chairman. Failing agreement as to an acceptable mediator, the Chairman will approach LEADR (Lawyers Engaged in Alternative Dispute Resolution) to appoint a mediator.

10. The relevant Managing Director together with Human Resources is responsible for any follow-up to ensure that any resolution has been implemented and that the harassment has stopped.

Possible Outcomes:

- an apology;
- agreed behaviour;
- transfer, demotion or dismissal of the person instigating the harassment;
- leave without loss of entitlements during the investigation, for either person;
- counselling support; and/or
- increased awareness of the firm's harassment policy.

206 A little later, there followed the "Health and Safety Statement". I shall set out that statement in full:

JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people.

The health and safety of all people within JBWere is a shared responsibility of the firm, and each team member. In fulfilling this responsibility, the firm has a duty to provide and maintain, so far as is practicable, a working environment that is safe and without risk to health. JBWere strives to:

- maintain the workplace in a condition that is safe and healthy
- provide adequate facilities to protect the welfare of all people
- provide and maintain safe systems of work
- provide information and support to enable people to work in a safe and healthy manner.

The Firm

- Will ensure the effective implementation of health and safety procedures
- Observe its responsibilities under the Acts and Regulations which apply to the finance industry.
- Consult with our people on relevant health and safety issues
- Review specific responsibilities so that they are consistent with the firm's health and safety objectives
- Maintain records of incidents and accidents so that health and safety standards can be monitored
- Assist and encourage rehabilitation following an injury or illness
- Provide access to First Aid
- Assist with health care for overseas business travel and expatriates.

JBWere Team Members

- Have a duty to take the care, of which they are capable, for their own health and safety and of other team members affected by their actions at work

- Will comply with the firm's health and safety procedures and directions
- Will effectively support and use items or facilities provided in the interests of health, safety and welfare.
- Report potential and actual hazards.
- Store materials and equipment properly.
- Ask for assistance rather than risk an accident.
- Support rehabilitation processes through positive involvement.
- Provide details on personal medical conditions of which the firm should be aware.
- Take appropriate care and comply with procedures whilst on overseas business travel.

The firm is committed to regularly reviewing these procedures as outlines in Health & Safety at JBWere, to ensure they operate effectively, and that changes to health and safety issues are reflected. The Group Manager – Human Resources, in conjunction with each Administration Manager, is responsible for this review.

Prevention is the most effective health and safety principle. Through a shared responsibility, co-operation and support from all people, we will realise our health and safety objectives and create a safe work environment for ourselves and the team.

207 The other subjects dealt with were “Insider Trading” and “Employee Securities Transactions and Transactions for Employees of Another Broker”. Treatment of the latter subject concluded as follows:

Adherence to the requirements outlined in this memorandum are a fundamental term of your employment. The changes outlined in this document which vary from your letter of offer constitute a variation of the terms of your employment. Accordingly, we require you to sign the attached form and return it to Human Resources where it will be placed in your file to indicate your acceptance and understanding of the revised terms relating to Staff Transactions.

208 As mentioned above, when the respondent accepted the appellant's offer of employment, he signed certain documents which were, apparently, attachments to the form of WWU which he received at the time. There were six such documents. One of those documents related to the need for the respondent to have a “Proper Authority” if he were to advise clients of the appellant. In order to determine whether a proper authority was required in the case of the respondent, the respondent was required to provide certain details, including whether he had ever held a proper authority, and whether he was a member of the stock exchange. He provided those details, and signed and dated that form. The second form was a

consent to the appellant electronically forwarding any changes to the respondent's biographical data required by the Australian Tax Office to that office by way of the separate company which undertook the administration of the appellant's payroll. The respondent completed, signed and dated that consent.

209 Each of the other four documents signed by the respondent related, in one way or another, to the contents of WWU. First, there was a form headed "Cash Transaction Reports Act 1988" and sub-headed "Form of Acknowledgment". By that form, which the respondent completed, signed and dated, the respondent said:

I, Peter Nikolich, hereby state that I have read, understood and agree to be bound by the procedures and provisions in the Cash Transaction Reports Act 1988.

Secondly, there was a form headed "Employee Electronic Communications and E-mail Protocol Agreement", and sub-headed "Form of Acknowledgment". By that form, which the respondent completed, signed and dated, the respondent made the following statement:

I, Peter Nikolich, hereby state that I have read, understood and agree to be bound by the Employee Electronic Communications and E-mail Protocol Agreement.

Thirdly, there was a form headed "Staff Transactions And Transactions For Employees Of Another Broker – Client records Copy", and sub-headed "Form of Acknowledgment". By that form, which the respondent completed, signed and dated, the respondent made the following statement:

I, Peter Nikolich, hereby state that I have read, understood and agree to be bound by the procedures and policies relating to Staff Transactions and Transactions for Employees of Another Broker.

Fourthly, there was a form headed "Health and Safety Statement" and sub-headed "Private & Confidential". By that form, which the respondent completed, signed and dated, the respondent made the following statement:

I have read and understood the Health & Safety statement outlining the obligations of each team member at J B Were.

Beneath that statement was a "Personal Health Statement", in which the respondent was

required to give, and did give, details of medical conditions, of medications which he took and of prior workers compensation claims. He was also asked to state whether he had ever been declined, deferred or “loaded” for life assurance or superannuation purposes.

210 Finally, I shall refer to a provision of WWU which was of some significance in the appellant’s case on appeal. At the commencement of the document, immediately after the table of contents, the following notation appeared:

The firm reserves the right to vary, change or cancel from time to time the information stated in this booklet.

CIRCUMSTANCES LEADING TO THE LITIGATION

211 When he commenced employment with the appellant, the respondent was given a list of clients for whose business he was responsible. Other names were given to him from time to time, and he himself added names. At this time (and until about mid 2002) the appellant was singly responsible for the business of the clients on his list.

212 As a result of an initiative in late 2001 by Mr Sutherland, the concept of a “partnership approach” was introduced into the work of investment advisers in the appellant’s Canberra office. Under this concept, a small group of investment advisers (in each case referred to in the evidence, three) would share a single list of clients for whose business they were jointly responsible. The concept was said to have a number of advantages over the existing system in which each adviser had his or her own list. In practice, and as explained by Mr Sutherland to the other advisers at the time, what was required was that financial advisers who proposed to form a “partnership” should draw up a “business plan” to which they agreed, and which dealt with the way their partnership would work in practice, the way clients’ needs would be serviced by the members of the partnership, and how the total revenues of the partnership would be allocated as between those members (eg for the purposes of the appellant’s incentive-based remuneration). Mr Sutherland himself entered into a partnership with two other investment advisers in the Canberra office. This was referred to as the “RSL Partnership”.

213 In 2002, the respondent and two other investment advisers, Ms Dal Bon and Mr Keogh, decided to form their own partnership, which became known as the “DKN

Partnership”. They drew up a business plan and showed it to Mr Sutherland. The DKN Partnership commenced operation on 1 July 2002.

214 In the discussion paper originally presented by Mr Sutherland on the partnership concept in December 2001, there was a “frequently asked questions” section. One of the questions was: “what if a member of the team wants to leave the partnership?” Mr Sutherland’s response was that the exit of a member from a partnership was “highly discouraged”. He said that a partnership was similar to a marriage, in that it was a long-term commitment. He added:

In the rare case that a partner insists on leaving the partnership, that partner will leave his/her clients behind with the partnership, with the exception of any clients who insist on dealing with the exiting partner.

In the business plan drawn up for the DKN Partnership, the respondent and his colleagues had agreed on the following “exit strategies”:

The decision to enter into a team arrangement has not been taken lightly. Under the team arrangement, if a team member decides to exit the partnership, then all clients will remain within the team structure with subsequent revenue to be spread 50:50.

215 On about 2 May 2003, Ms Dal Bon announced that she would leave the employ of the appellant on 30 June 2003. This development squarely raised the question of the allocation of the existing clients of the DKN Partnership. The respondent and Mr Keogh accepted that they would be unable to provide a proper service to all the clients who had been on their combined list with Ms Dal Bon. According to the respondent, there was a suggestion, with which Mr Sutherland initially agreed, that some “relatively inactive family groups” should be transferred to an online service operated by the appellant. After some further development of that proposal, however, Mr Sutherland changed his mind and, on 10 June 2003, announced that a large number of high-value clients would be transferred out of the DKN Partnership. There followed an acrimonious conversation between the respondent and Mr Sutherland. According to his Honour –

Mr Sutherland made a number of critical and offensive comments, including telling [the respondent] he was ‘disgusted’ with his ‘greed’, that he was ‘lazy’ and whingeing’. [The respondent] claimed in evidence that he felt Mr Sutherland had a conflict of interest, being both the person allocating clients

and a member of team RSL, and that he suggested Mr Sutherland appoint an independent person to mediate the dispute over allocation.

When the respondent told Mr Sutherland that he would speak to Paul Heath (the Manager, NSW Private Clients, of the appellant) about the matter, Mr Sutherland replied “you speak to Paul Heath and you will get nothing”.

216 The respondent and Mr Keogh did speak to Mr Heath. They complained to him of Mr Sutherland’s decision to reallocate a good many of the higher value clients away from the DKN Partnership. According to a file note made by Mr Heath, the concerns of the respondent and Mr Keogh were, first, that they did not understand the reasons for the reallocation policy; that they did not feel that the reallocation was in the best interests of the clients; and that they were concerned about their relationship with Mr Sutherland, particularly insofar as Mr Sutherland had called them “greedy”. They did not offer any solutions to Mr Heath, who made it clear to them that he did not want to interfere with Mr Sutherland’s right to run the Canberra office, and that he would not offer an opinion without asking Mr Sutherland’s point of view. Before Mr Heath could speak to Mr Sutherland, the former received an email from Mr Keogh, explaining his difficulty with Mr Sutherland’s change in client allocation policy, and concluding with the following paragraph:

I am not aware of any intention of Rod to speak with you on this issue following our discussion with him. My view on the matter is that unfortunately reason has not won the day which is disappointing however we did decide before going ahead with talking with you, that we would accept any decision as final and we have to accept that. If you think that any issue needs to be raised as a result of our discussions with you please feel free to do so as everything is now out in the open otherwise I guess it is a closed matter.

When Mr Heath did speak to Mr Sutherland, the latter said that “the issue has now been sorted out”, and the former said that he had told the respondent and Mr Keogh that he did not want to interfere, but that he would have been concerned if Sutherland had said to them “don’t call Paul”. He told Sutherland that “we will always support you however you must not shut down the staff”.

217 It seems that the concluding paragraph of Mr Keogh’s email was not an accurate representation of the respondent’s position. At a meeting on 8 July 2003, at which Mr Sutherland announced the distribution of the new client lists, he (Sutherland) said: “if I

become aware of any adviser having had previous contact with clients without my authorisation there will be trouble". While saying this, Mr Sutherland looked directly at the respondent and Mr Koegh, and used a very intimidating tone.

218 Two days later, on 10 July 2003, there was a discussion between the respondent and Mr Sutherland about the latter's allegation that the former had had contact with a previous client without the latter's authority. Mr Sutherland told the respondent that he was "tired of seeing you drag your feet around the office". The respondent told Mr Sutherland of the adverse financial impact which he and his family would suffer as a result of the reallocations, and Mr Sutherland replied: "I am not responsible for your financial situation, I am not your father, and if you have problems at home you shouldn't bring them to work."

219 On 28 July 2003, the respondent wrote to the human resources section of the appellant. He said that he wrote with "a considerable degree of trepidation" to express his concern over issues that had occurred in the Canberra office. He said that those issues had caused him a significant degree of "angst". He recited at length the events which had followed Ms Dal Bon's announcement of her imminent departure. He complained about the reallocation of clients away from the DKN Partnership. He referred to the statements made by Mr Sutherland on 8 and 10 July 2003. He referred to Mr Sutherland's aggressive statements and demeanor. He implied that Mr Sutherland had reallocated clients, at least in some cases, to his own advantage. He said that he viewed Mr Sutherland's remarks and behaviour at the meeting on 8 July 2003 as "extremely intimidating and threatening". He said:

Upon further investigating the JB Were Career Mentor Program – Your Role as Manager in Career Development – quoting 'since discussions will take place about personal issues, including doubts an individual may have about their future direction or about personal weakness, the role demands sensitivity to the individual feelings. The individual needs to have a relationship of trust and confidence'. Unfortunately, my trust and confidence in Rod is non-existent.

220 The respondent said that he had found Mr Sutherland's comments and actions "both threatening and disturbing", and that he felt "a considerable" degree of anxiety, stress and discomfort" and was "reluctant to accept the decision as final". He enclosed with his letter a copy of an item extracted from the Australian Financial Review of 22 July 2003 headed

“Bully Bosses a Health Risk for Workers”. The burden of that article was that bullying by bosses in the workplace can affect employees’ blood pressure, and increase the chance of heart attack or stroke. The respondent said that the item reinforced his view that “Canberra Management in recent weeks has displayed a considerable number of these traits.” He added: “It has become apparent that Rod has given little consideration to the success of advisers outside of the RSL team as the situation appears to be stained with nepotism”. The respondent asked for his letter to remain confidential.

221 The respondent’s correspondence came to the attention of Gina Jowett, the appellant’s Human Resources Manager based in Sydney. She immediately telephoned the respondent and made arrangements to speak at a time when he was not in the office. They had a lengthy telephone conversation on 6 August 2003. According to a file note made by Ms Jowett, the respondent told her that he wanted something done by management about what he viewed as “a case for discrimination and intimidation”. Ms Jowett said that there were two issues – the client distribution issue and the behavioural issue in the office. The respondent disputed that, saying that intertwined there was one situation only, not separate issues. He said he was not happy, and was stressed. The environment was not conducive to allow him to do his job appropriately, and management had done nothing about it. He said that the only way forward was for Mr Sutherland to be removed from his role, and that he would not be satisfied until that step had been taken. Ms Jowett said that, as that was the first discussion which they had had, it was an opportunity for him to elaborate on his concerns. She acknowledged the respondent’s feelings, and said that they needed to “work through” the matter. She explained the appellant’s complaint process to the respondent. The respondent indicated that they would “just wait and see” and that, for him, there was only one option to resolve the matter. Ms Jowett said that she would investigate the situation.

222 Ms Jowett telephoned the respondent about two days later. Again, the respondent said that it was up to the appellant to make decisions surrounding client allocation. He said that Mr Sutherland had become aggressive and intimidating, and was “demonic” and “on fire” and in no mood to negotiate. The respondent said that he could see the whites of Mr Sutherland’s eyes, and that he had never seen anyone that far out of control before.

223 Although the timing of the steps next taken by Ms Jowett is unclear, it does appear as

though a period of about at least two weeks passed before she did anything else in relation to the respondent's complaint. In a conversation which Ms Jowett put as "towards the end of August", she discussed the matter again with Mr Heath. Mr Heath said that he and another member of the appellant's staff identified only as "Chris" were working with Mr Sutherland to have him step aside. Apparently he said there were numerous discussions occurring in the background which would result in Mr Sutherland stepping aside.

224 Ms Jowett contacted Mr Sutherland, and arranged for him to meet her at the appellant's Sydney office on 27 August 2003. It was then that she showed Mr Sutherland the respondent's letter of 28 July 2003 for the first time. Mr Sutherland denied most of the respondent's substantive allegations, but agreed that morale was bad in the Canberra office. Ms Jowett told Mr Sutherland that at a minimum some of his comments had been unprofessional, and that he needed to make sure that he did not put himself or the appellant in "this position" again. Mr Heath joined the discussion, and told Mr Sutherland that lack of transparency and consistency of decision making had caused a loss of trust and confidence in his management style, and he needed to consider his position carefully. Mr Sutherland said that he found his role difficult, and that he would think about that feedback carefully.

225 Although there is no specific record of what passed, it seems that Ms Jowett and the respondent had a number of telephone conversations about the respondent's complaint in the months of August, September and October 2003. In his affidavit, the respondent said there were six to eight such conversations.

226 On 10 October 2003, Ms Jowett arranged for the respondent to fly to Sydney, and on 15 October 2003 he did so, and there met Ms Jowett and Mr Heath. Ms Jowett told the respondent that Mr Sutherland was stepping aside from his role as Canberra manager. To her surprise, the respondent indicated that he already knew that fact. He raised a new complaint about Mr Sutherland, namely, that one of his clients, a Mr Alan Barter, had been manipulated by Mr Sutherland to discontinue receiving service from the respondent, and to commence receiving service from Mr Sutherland. There was some discussion about that new complaint.

227 At this meeting, there was also discussion about the respondent's original complaint. According to Ms Jowett's file note, she and Mr Heath told the respondent that, without knowing what his expectations were, it was difficult to work towards an outcome. He said he

was too stressed to think about the situation, that he had not been feeling well, and that one option would be for the appellant to allow him some time off work. Ms Jowett said that he was welcome to take time off work, either as holidays or (with a medical certificate) as sick leave. The respondent said he was frustrated about the whole situation, and that when he came into the office each morning (according to Ms Jowett's notes) "he felt sick, he actually hated [Mr Sutherland] and hated the sight of him – just looking at him made him feel ill". Ms Jowett said that that was a concern to her, and referred to the appellant's employee assistance program. She explained the availability of a confidential counselling service provided by an outside organisation and available to the respondent. A few days after this meeting, Ms Jowett completed an authorisation form for that counselling service to be provided to the respondent, at the expense of the appellant.

228 As mentioned in the meeting on 15 October 2003, Mr Sutherland stood aside from the position of Manager of the Canberra office in that month. He was replaced by another investment adviser, Mr Dorian Bontempelli. Ms Jowett discussed the respondent's new complaints regarding Mr Barter's account with Mr Bontempelli. When the matter was put to Mr Sutherland, he said that it was Mr Barter himself who had decided to take his account away from the respondent.

229 Some time in November 2003, Ms Jowett telephoned the respondent to advise him of the outcome of his complaint. She said that his concerns had been taken seriously, and that she had investigated the situation raised by his complaint, as well as the incident relating to Mr Barter. She said that Mr Heath had instructed Mr Sutherland that any transfers of clients between staff members in the Canberra office would in future be referred to Mr Bontempelli. She said that Mr Bontempelli and Mr Heath "would investigate further the situations and make decisions around that". The respondent reacted to this news with disbelief. He asked: "what else are you going to do?" Ms Jowett said that she felt that the situation had been addressed in the most appropriate way. She said that the combination of Mr Sutherland moving from the role of Manager, and the instructions that had been given to him, "were the most appropriate course of action in this point in time". The respondent said that the issues had been "swept under the carpet", and became quite hostile over the telephone. He said he wished to see the response in writing as soon as possible, and that he was not satisfied.

230 On 1 December 2003, the respondent attended at the rooms of his General Practitioner, Dr Jamieson. According to a letter which Dr Jamieson wrote to the respondent's solicitors on 15 April 2005, the respondent presented in a most distressed state, and related a six month history of workplace conflict. He told Dr Jamieson that the conflict was of such a degree that his career in the industry as a whole was compromised, and that it had had a very serious effect on his mental state, on his marriage and on his family life. Dr Jamieson said the respondent presented with symptoms of a major depressive disorder, ie depressed mood, poor self esteem, an extremely poor view of his future, a great sense of failure and withdrawal. Dr Jamieson prescribed anti-depressant medication. On the same day (1 December 2003), the respondent commenced a period of sick leave, and remained on leave until 2 January 2004.

231 In a letter to the respondent dated 1 December 2003, but not sent until 8 December 2003, Ms Jowett said:

I have now completed an investigation into your complaints. Following my review of the issues you have raised, I acknowledge that an apparent lack of transparency and failure by Rod to clearly communicate his decisions regarding the allocation of client accounts has contributed to the issues you have raised in your complaints concerning your relationship with Rod. However, I confirm that it was necessary and appropriate for Rod in his position as the Canberra Manager to make decisions regarding the operations of the Canberra office. Rod's decisions regarding the allocation of client accounts following the resignation of Gabrielle Dal Bon were appropriate having regard to the needs of the firm's clients and the operations of the Canberra office. Although, I accept that you have felt distressed and upset on occasions as a result of the issues giving rise to your complaints, I am satisfied that Rod has not attempted to intimidate you or cause you stress during his discussions with you about the allocation of client accounts.

As you are aware, Rod has stepped down from the position of Canberra Manager and is now employed in the position of Investment Adviser in the Canberra office. Dorian Bontempelli has subsequently been appointed to the role of Canberra Manager.

In your letter dated 10 October 2003 you make a complaint in relation to the transfer of the Barter account to Mark Keogh. Following my investigation, I have found no evidence to support your claim that the confidential complaint made by you against Rod has been discussed by him with any clients or that Barter's decision to transfer its account to Mark was related in any way to your complaint against Rod.

232 The respondent did not accept the resolution of his complaint by Ms Jowett. He required the matter to be referred further up the line, as a result of which it was dealt with by Ms Diane Jacobs, the Group Manager, Human Resources, of the appellant. Although she did not give evidence, a file note made by Ms Jacobs of a meeting with the respondent on 17 March 2004 was admitted into evidence. According to that note, the respondent said that the “key points were around the allocation of clients”. He felt his job was under threat. He said he was “off his rocker” and that he would not “go there now”. Ms Jacobs noted that the respondent looked “as if he would cry”. He felt that no one was listening to him. He alleged that Mr Sutherland had stepped down for family reasons, not because of his complaint. He felt his complaint was being ignored. He explained that, in December 2003, he was very stressed, he sought counselling, he was referred to his doctor, he was put onto medication, he was “suicidal”, he could not face going to work, he was on medication during the day and on sleeping pills at night, and he felt isolated and not supported. Mr David Evans (the Managing Director – Retail for NSW of the appellant), who was at the meeting, told the respondent that he had been through a lot, and apologised. He said that it was not the case that the matter had not been treated seriously by the appellant. He said that the feedback given by the respondent to Mr Heath had been considered “and formed a real part of the decision regarding [Mr Sutherland] not continuing in the role of Manager.” Ms Jacobs herself said that it was handled in the way it was to help the respondent “retain confidentiality and dignity”.

233 On 29 March 2004, Mr Evans wrote to the respondent with a financial offer, being a minimum bonus payment of \$100,000 for the six months to 30 September 2004. The respondent did not accept that offer. Instead, he sought financial compensation for what he said was a loss of \$300,000. Further, he wanted the appellant to rectify the impact of Mr Sutherland’s reallocation of clients. He said that the obvious “method” would be “to undo the unfair distribution and re-transfer clients with annual brokerage/fee revenue totalling \$300,000 to my adviser code ... as at 1 July 2004.” He further sought that the RSL Partnership (of which Mr Sutherland was a member) be dissolved and its members relocated to other dealing desks.

234 At the conclusion of a further meeting held on 22 June 2004, Mr Evans handed the respondent a letter which referred to his rejection of the offer contained in the letter of 29 March 2004, which contained a denial that the appellant was liable to compensate the

respondent as proposed by him, which said that the matter was now “closed and no further offers of assistance will be made”, and which stated that, if the respondent were fit for work, he would be expected to carry out his full range of duties and responsibilities.

235 On 9 July 2004, the respondent saw a Clinical Psychologist, Mr O’Neill, on reference from Ms Jowett. In the concluding section of a lengthy report written by Mr O’Neill that day, he said that the respondent met the criteria for a major depressive episode by December 2003, and that the symptoms which he displayed definitely interfered with his ability to function both at work and at home. The respondent still (ie in July 2004) had signs of a low grade depression consistent with a dysthymic disorder. Mr O’Neill said that the respondent was convinced that he had been unfairly treated by Mr Sutherland, and was highly sensitive about how his concerns were being dealt with by the appellant, and his perception that Mr Sutherland had been able to get away with some unacceptable, unprofessional behaviour.

236 The respondent commenced sick leave again on 6 August 2004. On 31 August 2004, his sick leave entitlement expired. He was paid salary for the next two weeks, and then had two weeks’ leave without pay. He then used accrued annual leave until 30 November 2004, when that too expired. From 1 to 6 December 2004, the respondent was on leave without pay.

237 On about 1 December 2004 (when the respondent had used up all his leave), the appellant wrote to him, seeking an indication as to his intentions to return to work and resume normal duties. The respondent replied by way of a letter from his solicitors dated 6 December 2004. It was said that the respondent had for some time been unwell because of various actions taken by the appellant. It was said that, if the respondent were to return to work at that time, it would have an adverse consequence for his health. The appellant responded by letter dated 7 December 2004, indicating that, in the circumstances which obtained, it regarded the respondent’s employment as having terminated. The trial Judge treated this letter, correctly I consider, as a termination of the respondent’s employment by the appellant.

238 The respondent was subsequently seen by four different psychiatrists. His solicitors referred him to Dr Lucas, who saw the respondent on 20 April 2005. Dr Jamieson referred the respondent to Dr Lowden, who saw him on eight occasions commencing on 26 April

2005 and concluding on 23 December 2005. Solicitors for the appellant or its insurer referred the respondent to Dr Samuell, who saw him on 6 September 2005 and 6 April 2006. They also referred the respondent to Dr Synott, who saw him on 24 October 2005 and on 31 March 2006. Each of these practitioners provided a written report as to the respondent's condition – and in some cases answered specific questions on such matters as causation – but none of them gave evidence before the trial Judge. The parties proposed, and his Honour accepted (initially with some reservations, it would seem) a procedure whereby the written reports of the practitioners were handed to his Honour as a joint exhibit. Based only upon those reports, his Honour was obliged to identify the medical evidence which he would accept.

CLAIMS AND DEFENCES

239 In his Second Amended Statement of Claim dated 4 April 2006 (“the Statement of Claim”), the respondent alleged that there were certain express terms of his contract of employment, including a term that he “acknowledge receipt of the respondent’s policies and comply with procedures as set out in the respondent’s document entitled ‘Working With Us’.” The appellant denied that allegation. In par 8A of the Statement of Claim, the respondent made further allegations as follows:

It was an express term of the Applicant’s contract of employment and subsequent promotions that the Respondent would not, by its servants or agents treat the Applicant other than in accordance with the Respondent’s policies as amended from time to time including the Respondent’s document headed “Working With Us”.

In par 10 of its Second Amended Defence (“the Defence”) the appellant responded to par 8A of the Statement of Claim as follows:

- (a) the Applicant was required to comply with the policies and procedures set out in the “Working With Us” document, however the “Working With Us” document did not constitute a term or condition of the Applicant’s contract of employment;
- (b) when the Applicant was offered employment with the Respondent, he was given a copy of the “Working With Us” document;
- (c) when the Applicant was offered employment with the Respondent, he was asked to sign off on specific policies and procedures contained in the “Working With Us” document but was not asked to sign off on the document itself;

- (d) the “Working With Us” document expressly states that the Respondent “reserves the right to vary, change or cancel from time to time the information stated in this booklet”; and
- (e) otherwise denies the allegations in paragraph 8A.

240 The respondent alleged that it was an express term of his contract of employment that the appellant “would comply with its grievance handling procedure”, and that thereby it was implied that the appellant would “act in a timely manner”, and would provide the respondent with “procedural fairness”, including keeping him informed that an investigation was taking place and of the nature of the investigation, interviewing him during the investigation, informing him of the responses or explanations advanced by Mr Sutherland, permitting him the opportunity to respond to any such explanations and enabling him to put forward proposals to remedy the breach of the DKN Partnership Business Plan which had been effected by Mr Sutherland. The appellant denied those allegations.

241 The respondent alleged further terms of his contract of employment (in par 33A of the Statement of Claim), as follows:

Further, or in the alternative, it was an implied term of the Applicant’s acceptance of the offer of employment, contract of employment and subsequent promotions that the Respondent would not, by its servants or agents:

- (i) intimidate or personally vilify the Applicant;
- (ii) subject to the Applicant to demeaning, harassing or abusive conduct or threats of such conduct;
- (iii) and that the Respondent would, so far as was reasonably practicable, protect the Applicant from any such harassing or bullying conduct occurring in the course of his employment.

The appellant denied all the allegations in par 33A.

242 There were two respects in which the respondent alleged that the introduction of the partnership concept in the appellant’s Canberra office had legal consequences which were relevant in the circumstances which obtained. First, the respondent referred to Mr Sutherland’s presentation, in December 2001, at which the concept was announced to the appellant’s financial advisors. The respondent alleged that this presentation included representations by Mr Sutherland, including a representation that he (Sutherland) would distribute all new business flowing from the office to advisers not involved in the RSL

Partnership, with the exception of new business generated through the direct activities of other members of that partnership, and a representation that, if a partner left a partnership, the clients of the departing partner would remain with the partnership in question. The respondent alleged that he relied upon these representations to participate in the establishment of the DKN Partnership, and expected to share in an anticipated partnership revenue of about \$1,900,000 in the following year, from which he would derive benefits by way of commission. The appellant joined issue with these allegations.

243 Secondly, the respondent alleged that the adoption of the business plan for the DKN Partnership, and its effective approval by the appellant, gave rise to an alteration of the then existing terms of his contract of employment, implicitly contending that the agreement between himself, Ms Dal Bon and Mr Keogh, by which that partnership was constituted, became incorporated into that contract. These allegations were denied by the appellant. The respondent also alleged that the appellant made a series of representations to him at about the time of the establishment of, and in relation to the operation of, the DKN Partnership. Those representations were said to be that the respondent could perform his duties through participation in the DKN Partnership, that the business plan for the DKN Partnership was approved, that the business plan formed part of the respondent's terms and conditions of employment, that the respondent could perform his duties under the contract of employment through the business plan, that the terms of the business plan would be enforced and that, in the event of the resignation of any member of the partnership, that person's clients would be redistributed, on a 50:50 basis, to the remaining two members of the partnership. The respondent alleged that those representations were misleading or deceptive, or likely to mislead or deceive, contrary to ss 52 and 53B of the TP Act. The respondent added a claim in negligence, the alleged breach of duty being constituted by the appellant's failure to exercise reasonable care to ensure that these representations were true and correct in every particular.

244 The respondent alleged that the appellant had acted otherwise than in good faith, and had thereby been in breach of his contract of employment, by failing to allow the remaining members of the DKN Partnership to retain the clients previously served by Ms Dal Bon.

245 The respondent alleged that, as a result of the reallocations of clients by Mr

Sutherland, there were “several altercations” which resulted in the respondent suffering “anxiety and stress” and in his relationship with Mr Sutherland “deteriorating substantially”. The respondent alleged that he sought to resolve the issue with Mr Sutherland, but Mr Sutherland refused to adhere to the terms of the business plan of the DKN Partnership; and in negotiations, Mr Sutherland “was aggressive, intimidating and threatening” towards the respondent. The respondent alleged that he sought to implement the appellant’s grievance handling procedure, that he wrote to the appellant’s Human Resources Department about Mr Sutherland’s conduct, that the appellant did not respond to his request for assistance adequately or comply with his request to have a formal response in writing, that the appellant never gave the respondent an explanation for “the five month delay in responding to his grievance” and that he was never provided with the opportunity to respond to “any assertions or explanations provided by Mr Sutherland (if any) for his conduct in re-allocating clients from Team DKN”.

246 The appellant mostly denied the respondent’s allegations to which I have referred. In relation specifically to the respondent’s allegations of a procedural failure (or procedural delays) in the handling of his grievance, the appellant alleged that Ms Jowett telephoned the respondent promptly upon receiving his letter of 28 July 2003, spoke to the respondent on numerous occasions between August and December 2003, flew the respondent to Sydney on 15 October 2003 to facilitate a discussion of his complaints, consulted Mr Evans, Mr Heath, Mr Sutherland, Mr Bontempelli and others on numerous occasions for the purpose of carrying out her investigation, kept the respondent informed of the progress of that investigation, and informed the respondent in writing of the outcome of the investigation.

247 The respondent alleged that the termination of his employment by the appellant on 7 December 2004 was unlawful as having been done for a reason prohibited by s 170CK(2)(f) of the WR Act. Although not referred to in his Statement of Claim, the prohibited reasons upon which he relied at trial were that set out in par (2) of the subsection – temporary absence from work because of illness or injury – and one of those set out in the list in par (f) of the subsection – physical or mental disability.

JUDGMENT OF THE TRIAL JUDGE

248 Having referred to the primary evidence in the case, the trial Judge devoted a section

of his reasons to the subject “findings about the evidence”. He divided that section up five ways. First, his Honour considered whether the principle in *Jones v Dunkel* (1959) 101 CLR 298 might apply in relation to certain persons in the appellant’s camp who had not been called as witnesses. Secondly, his Honour dealt with certain credibility issues which arose.

249 Thirdly, his Honour dealt with the subject “the handling of [the respondent]’s complaints”. This was an important part of his Honour’s reasons, the content and significance of which needs to be appreciated for later parts of the reasons, dealing directly with questions of breach of contract, properly to be understood.

250 His Honour commenced by agreeing with counsel for the respondent that the appellant’s handling of the respondent’s complaint was “extremely inept”. He said that that conclusion arose “irresistibly” from the evidence of the appellant’s own witnesses, and contemporaneous letters and file notes. His Honour said that there was “an inherent conflict of interest” in a system under which an office manager has the task of allocating clients amongst financial advisers, of whom he himself was one. He held that it should have been obvious to the appellant’s senior officers “that it was essential to develop and enforce a client-allocation protocol which left no room for the office manager to favour himself or his own team, or be perceived to be doing so”. Knowing that there was no such protocol in place, Mr Evans and Mr Heath should, according to his Honour, have been particularly sensitive to any complaint “whether justified or not” that Mr Sutherland had abused his power of allocation. His Honour noted that Messrs Evans and Heath failed to act upon the respondent’s complaint that that is what had happened in relation to the reallocation of Ms Dal Bon’s clients; indeed, he said that these men “seemingly failed to comprehend” that complaint.

251 His Honour referred to three allegations which had been made by the respondent in his letter of 28 July 2003, namely:

- (i) Mr Sutherland’s final reallocation decision was a reprisal for the action of [the respondent] and Mr Keogh in raising their concerns with Mr Heath;
- (ii) A majority of the ‘A’ Clients taken away from team DKN were ‘allocated to the RSL team’; and
- (iii) Contrary to previous assurances that he would not benefit personally, Mr Sutherland had ‘quarantined numerous valuable clients for

himself and will also benefit from a majority share of business written of those clients transferred to RSL’.

His Honour said that it was “possible to say” that the allegations in (ii) and (iii) overstated the situation. He said that he was not able to make a finding about the allegation, going on to say that that allegation “may have been incorrect”. His Honour said that it did not matter. His point was that “these were all serious allegations warranting investigation, yet there was no effective investigation.” On the subject of an investigation, his Honour continued that “it might have been thought” that the respondent’s letter of 28 July 2003 would have resulted in a “senior person immediately travelling to Canberra and conducting a series of one-to-one meetings with members of the Canberra staff”. His Honour said that that would not have been “a large task”. In response to the suggestion that it would have been difficult for Ms Jowett to conduct confidential meetings in the Canberra office, his Honour said “she surely could have arranged a room elsewhere in the city”. He said that everybody in the office would have known that meetings were being held, “but they all must anyway have known of the conflict between Mr Sutherland and [the respondent]”.

252 In response to the submission that, at the relevant time, Ms Jowett knew that Mr Heath was discussing the possibility of Mr Sutherland stepping down as Canberra manager, his Honour said that Mr Sutherland’s removal “would not have reversed the allegedly unfair reallocation decision”. He said that it would have remained necessary for Ms Jowett to investigate that decision “and, if it was wrong, take action to rectify the position”. He concluded: “In any event, it was not reasonable for Ms Jowett to delay for three months, while Mr Sutherland considered his position.”

253 His Honour set out a fairly lengthy passage from the evidence of Mr Evans, and which his Honour himself addressed a number of questions to the witness. That evidence was as follows:

Well, if you saw his letter it would have been obvious to you that what he was saying and rightly or wrongly was, in effect, that Mr Sutherland had allocated on the basis that took into account his own self interest rather than fairness to other people, that's perhaps putting fairly mildly what he was complaining about, is that right?---That's right.

Now, doesn't that complaint go to the real heart of the system that Goldman Sachs operated whereby it had branch managers who were already financial

advisers and had to trust their integrity to do the right thing in allocations, does it not?---That's correct.

Now, what I don't understand ... why weren't there red lights flashing in your mind and in the mind of those like Mr Heath who had responsibility, to say, hang on, what's Mr Sutherland doing and I add to that, this at the very time when you were developing your own very serious doubts about Mr Sutherland's performance?---Look, in hindsight, I should have got more involved. I did leave it to Mr Heath at the time. You're absolutely right, sir, that we do place a lot of emphasis on integrity of the manager. What happens in client allocations is if an adviser knows and has a relationship with that client that may be looked after by another client adviser in the office, that when that client adviser leaves for smoothness of the relationship that it goes to one of those other or the adviser that has the existing relationship.

Well, I understand that, but one of the arguments in favour of partnerships is that advisers can cover for each other?---Correct.

When, for any reason, they're away?---Yes.

So that instead of everybody having, if you like, a one person relationship with a particular client, although no doubt that's the person the client primarily asks for when they ring up. If they ring up X, they also know that if X is away to ask for Y or Z?---Absolutely, your Honour.

And Y or Z get to know something about those clients, that's the whole argument in favour of partnerships, isn't it?---Yes, it is, absolutely.

So why doesn't the logic of that mean that if X leaves, at least within the limit of their capacity to service, Y and Z are the people who take over those clients?---Yes, look, without the knowledge that Paul Heath who was involved in this has on how the allocation was done, I really can't answer the question.

But what worries me is that I would have thought that after that letter of July, somebody would have gone down to Canberra, it's easy enough to get to, and spend a day in the office and said "I want to look at the way that Dal Bon's clients have been allocated" - - -?---I suspect that did happen, I don't know. - - - gone through it and asked Mr Sutherland to justify what he's done, would you agree that that is what should have been done?---Yes, yes absolutely. You see, if you've got a problem with an employee, you can nip the grievance in the bud and give the person satisfaction. You don't run into the psychological problems that undoubtedly have occurred here?---I totally agree with you, sir.

Although his Honour raised the occurrence of "psychological problems" with Mr Evans at the end of this passage, for the most part his Honour's questions, and Mr Evans's responses, were concerned with good organisational and personnel practices.

254 His Honour observed that, having received the respondent's letter, Ms Jowett allowed nearly a month to elapse before she showed the letter to Mr Sutherland. She did not interview the other people who were named in the respondent's letter. More than two months after receiving the letter "and without having taken any meaningful action to establish the truth or otherwise of his allegations", Ms Jowett invited the respondent to attend a meeting in Sydney with herself and Mr Heath. His Honour continued:

However, it is apparent from Ms Jowett's file note that this meeting did not address the concerns he had raised in his letter; rather it developed into a counselling session about [the respondent]'s stress. Instead of responding to a plea for justice, Ms Jowett and Mr Heath, no doubt with good intentions, treated him as the problem. This response was inappropriate.

His Honour said that a further six weeks were then allowed to elapse before Ms Jowett formally responded to the respondent's complaint. Even then, he said, "she missed the main point of his complaint". He said that Ms Jowett failed to deal with the respondent's allegations of abuse of power, except by the bland statement that Mr Sutherland's allocation decisions "were appropriate having regard to the needs of the firm's clients", a matter about which she had made no inquiry. His Honour noted that Ms Jowett made no reference to the DKN partnership business plan. His Honour said that, if Ms Jowett had thought that the business plan was inapplicable to the situation which had arisen on Ms Dal Bon's departure, "it would have been helpful for her to explain why that was so".

255 His Honour said that the respondent was "understandably dissatisfied with this response." He noted that the respondent asked that the complaint be referred to Mr Evans, and continued:

However, they were even less active in ascertaining the merit of his complaints; they seem to have made no investigation at all. Instead, and once again no doubt with good intentions, they set about counselling [the respondent]; once again, he was treated as the problem.

256 Fourthly, his Honour considered the extent to which the respondent had contributed to the appellant's "inept handling of his complaints". He referred to the respondent's delay until 28 July 2003 before making his complaint, a delay which "possibly set the tempo for Ms Jowett's subsequent dilatory conduct. His Honour referred also to the respondent's delay, in early December 2003, to notify the appellant of his change of address. His Honour held that

it was only fair to note that the respondent was “suffering stress at both these times”, a circumstance which was well known to the relevant employees of the appellant. His Honour observed that “it might be thought” that the respondent was unwise to refuse the offer made by Mr Evans on 29 March 2004, but said that the respondent thought the offer did not “provide a just result”, which was a judgment the respondent was entitled to make.

257 Fifthly, his Honour made findings about the respondent’s psychological condition. I need only set out his Honour’s conclusion in this regard:

It follows that I find [the respondent] has suffered, and perhaps continues to suffer, a major depressive disorder flowing from the events the subject of this proceeding. In accordance with the overwhelming view of the experts, it would be inadvisable for him to return to employment by [the appellant]. However, it seems he can return to work in the finance industry. This will not be easy for him to do. [The respondent] is obviously disillusioned about the culture of the finance industry. However, as several of the experts pointed out, a major aspect of his current problem is his feeling of injustice. If that problem is resolved, and a job is available, he probably can return to the industry, although probably not immediately in a full-time capacity.

258 His Honour then turned to the respondent’s claims as such, commencing with those which arose under the WR Act. He held that the condition of “temporary absence from work” necessary to have made the appellant’s termination of the respondent’s employment unlawful pursuant to par (a) of s 170CK(2) had not been established in the circumstances. What constituted “temporary absence from work” was exhaustively defined in reg 30C of the *Workplace Regulations 1996* (Cth), and his Honour held that the respondent’s absence from work did not come within the terms of that regulation. As to the matter arising under par (f) of the subsection, his Honour held that the appellant had not made good its defence of the respondent’s claim that his employment was terminated by reason of his mental illness, but that it was “an inherent requirement of the position” that the respondent attend at work to carry out the duties of a financial adviser. In the circumstances, his Honour upheld the appellant’s defence under subs (3) of s 170CK of the WR Act.

259 Dealing with the respondent’s claims of contract, his Honour held first that the creation and approval of the DKN Partnership business plan did not constitute a variation of the respondent’s contract of employment. He said that that plan was something done by the relevant people in the course of their employment, rather than by way of alteration of the

underlying terms governing the employment of any of them.

260 The second limb of the respondent's case in contract was that which depended upon the incorporation of certain provisions of WWU into his contract of employment. His case was one of express incorporation, the parties' agreement to which was to be inferred. This approach was necessitated by the absence of any explicit written or oral term to the effect that WWU would be so incorporated. The matter of inferred incorporation was the first question determined by the trial Judge.

261 His Honour commenced by noting that WWU had been received by the respondent when he commenced employment, and so received "in the context" of the paragraph in his letter of offer which appeared under the heading "General Instructions" (to which I have referred in par 176 above). His reasons then referred to a number of the provisions of WWU, and to the pleadings in par 8A of the Statement of Claim and par 10 of the Defence. In response to a submission made on behalf of the appellant that WWU went no further than to set out directions such an employer may at any time give to its employees, his Honour said:

However, the document did more than set out directions to employees. It contained numerous provisions that purported to be promises made by [the appellant] or that purported to grant specific entitlements to employees. Many of these provisions related to matters that one would normally expect to find covered by a contract of employment. If the document does not bind [the appellant] at all, those of its provisions that constitute promises by [the appellant], or which purport to confer entitlements, are misleading, a cruel hoax; moreover, employees to whom the document was issued have no enforceable right in respect of numerous matters that are routine employee entitlements.

His Honour next dealt with the matters to which I have referred in par 178 above. He mentioned ("for such relevance as it may have") the views of some of the appellant's managers as to the binding effect of WWU.

262 His Honour next considered *Riverwood International Australia Ltd v McCormick* (2000) 177 ALR 193, referring to a number of passages in the judgments of the trial Judge and of the members of the majority in the Full Court, and concluding:

In *Riverwood*, the relevant term of the employment agreement was that the employee would 'abide by' the policies and practices contained in a secondary document. In the present case, the relevant term of the employment

agreement was that [the appellant] ‘will expect’ [the respondent] to ‘comply as applicable’ with presently-existing and future ‘office memoranda and instructions’. There is not much difference between the wording of the two terms. Also, in both cases, the relevant secondary document clearly purported to impose obligations on the employer, some, at least, of which are obligations customarily found in employment contracts and which would otherwise be absent from the employment contract. Accordingly, it seems to me that the approach taken in *Riverwood* has application to this case.

The trial Judge said it was difficult to accept “that the parties did not intend, at least, that the obligations customarily found in employment contracts would be contractually binding.” His Honour considered it significant that WWU was sent to the respondent with his letter of offer, that he was required to familiarise himself with its terms, and that it was in his possession when he accepted the offer. He held that the “explicit promises” made by the appellant in WWU were express terms of the respondent’s contract of employment.

263 The real issue, according to his Honour, was whether the appellant had incurred any contractually binding obligations as a result of “the provisions concerning behavioural standards” to which he had referred in his judgment. His Honour’s determination of that issue appears in the following paragraph of his reasons:

This issue should be resolved in the applicant’s favour. It is clear that [the appellant] was concerned to insist that all its employees (including [the respondent]: see the term of his employment contract set out in para 213 above) would comply with those behavioural standards, which it trumpeted as reflecting the firm’s values and culture. It provided mechanisms in WWU for resolving problems, including satisfaction of grievances. It made promises about supporting staff, including (relevantly) ‘anyone who makes a genuine complaint’. Particularly as the document appears to impose legal obligations on [the appellant] in relation to other matters, I see no reason to doubt that it also does so in relation to those provisions of the document that contain express promises about behavioural standards. The document must be read fairly and reasonably; that means [the appellant] must be accorded some discretion as to how it will deal with any particular management problem. However, I accept that the respondent may be held liable in breach of contract where it can be shown that, on no view of its conduct, has it responded to a problem or a complaint in the manner promised or assumed in a particular WWU provision. The question, then, is whether this has been shown in this case.

264 The trial Judge next turned to the question whether the appellant had been in breach of its contractual obligations as so identified. First, his Honour held that the conflict of

interest provisions in WWU were concerned with the avoidance of conflicts between the personal interests of advisers (including Mr Sutherland) and the interests of the appellant's clients. They did not cover a circumstance – such as that alleged by the respondent – where there was a conflict of interest between one of the appellant's employees (Mr Sutherland), who had to make a management decision, and another of those employees (the respondent). Thus his Honour held that, although contractual, the conflict of interest provisions in WWU had not been breached by the appellant in the circumstances of the case before him.

265 Secondly, his Honour held that the appellant had failed to comply with what he described as its "health and safety obligations". He found those obligations stated in the passages of WWU which I have set out at par 206 above. Specifically, his Honour referred to what he described as the appellant's "promise" to take every practicable step to provide and maintain a safe and healthy work environment for all people. He referred also to the appellant's acknowledgment that it had a duty to provide and maintain, so far as was practicable, a working environment that was safe and without risk to health. His Honour noted that counsel for the respondent had "focused their submissions about health and safety on Ms Jowett's conduct". He set out the following passage from counsel's submissions:

The letter of complaint from the Applicant dated 28 July 2003 contains serious allegations of bullying and harassment in the workplace and states that the Applicant was suffering from feelings of intimidation and harassment as a result.

The file notes taken by Ms. Jowett in her initial conversations with the Applicant in August 2003 indicate the extremely distressed state of the Applicant at even that early stage.

The Applicant's continuing agitation of his complaint for the four (4) months that it took to complete the investigation was apparent to all of the Respondent's managers who dealt with him, but particularly to Ms. Jowett who stated that she observed the Applicant's symptoms increasing over time.

During cross examination, it was apparent that Ms. Jowett had no understanding of the obligations placed upon her under the Health and Safety policy (or the OHS legislation). Although Ms. Jowett stated that it was her view that she had complied with the health and safety policy of the Respondent, Ms. Jowett's explanation of the steps that she took in relation to risk identification, risk assessment and risk management displayed that in fact no such steps had been taken. Risk identification was thought by Ms. Jowett to be about providing EAP or employee assistance program counselling. Ms. Jowett said risk identification also involved protocols

training, although she could not specify the dates upon which that training had happened and whether or not the Applicant or Mr. Sutherland had attended such training. However, it is apparent from those answers that Ms. Jowett had no idea as to what was required in terms of the identification of an occupational health and safety risk.

In terms of risk assessment, Ms. Jowett said that this had been satisfied by obtaining feedback from Mr. Sutherland and the Applicant. In terms of the proactive steps to prevent the risk actually materialising into an injury, being something that Ms. Jowett said she understood what was required, Ms Jowett's evidence was as follows:

“Further discussions, you know, was the primary issue. The matter was still being investigated so I suppose during the course of that it was a matter of identifying what the risk actually was, and any point during that period.”

Ms. Jowett then elaborated by saying that risk management was undertaken by:

“During the period of the investigation we had increased representation by the management group in the Canberra Office”.

Ms. Jowett then advised that this increased representation was by visits from the Private Client Managers, Chris Voigt and Paul Heath. However, when cross-examined as to the actual times that Mr. Voigt and Mr. Heath had visited the Canberra Office following the Applicant's complaint, Ms. Jowett could provide no information other than an attendance on one occasion on 18 August 2003.

His Honour said that he had some difficulty with the subdivisions of risk identification, risk assessment and risk management. He said that those subdivisions were not mentioned in WWU (in which respect his Honour may not have had in mind the provisions of WWU which were relevant at the time of the appellant's conduct of which the respondent complained – see par 332 below). His Honour did, however, agree with the following “summary submission” made on behalf of the respondent:

It is submitted that the Respondent breached its own Health and Safety policy, being an express term of the contract of employment with the Applicant, by reason of the failures and omissions of Ms. Jowett. Despite the fact that Ms. Jowett had been put on notice of potentially injurious conduct by Mr. Sutherland and the effect that it was having on the Applicant, no steps at all were taken which would satisfy the relevant occupational health and safety procedures laid down in a “Working with Us” document.

That breach, taken together with the breaches discussed below in relation to the grievance handling procedure, ultimately led to the onset and exacerbation

of the Applicant's psychological symptoms.

266 What followed next in his Honour's reasons was a critical passage, and one to which much of the appellant's case on appeal was directed. It was par 275, as follows:

As counsel submitted, Ms Jowett was aware from the beginning that [the respondent] was in an extremely distressed state. Mr Heath also soon became aware of this. Both people knew [the respondent] was continuing to work in a small office managed by a person with whom he had come into serious conflict, whose actions [the respondent] had found 'extremely intimidating and threatening' and with whom he was no longer on speaking terms. It ought to have been obvious to both Ms Jowett and Mr Heath that it was necessary urgently to investigate and resolve the issues raised by [the respondent], to reverse any inappropriate decision that had been made by Mr Sutherland, to take action to effect a reconciliation between the two men and/or, if it was appropriate, to terminate Mr Sutherland's supervision of [the respondent]'s activities. An employer who took seriously its obligation to 'take every practicable step to provide and maintain a safe and healthy work environment' would have done this. [The appellant] did not.

His Honour then held that the respondent had established a breach of the health and safety obligations in WWU.

267 Thirdly, his Honour dealt with the harassment provisions in WWU. He identified the respondent's allegations in par 33A of the Statement of Claim (see par 241 above) as being relevant to those provisions. His Honour said that the allegations in subpars (i) and (ii) were directed to the actions of Mr Sutherland (for whom the appellant was vicariously liable), while the allegations in subpar (iii) related to the inactivity of Ms Jowett and Mr Heath to which his Honour had already referred in dealing with the breach of the health and safety obligations.

268 His Honour described Mr Sutherland's behaviour as intimidatory and demeaning, and said that, foreseeably, it might have caused psychological damage to another person. His Honour continued:

It was behaviour inconsistent with [the appellant]'s promise to 'take every practicable step to provide and maintain a safe and healthy work environment'. It was also inconsistent with the statement, in the sub-section of WWU relating to harassment, about [the appellant]'s asserted 'culture and "family" approach' meaning that 'each person is able to work positively and

is treated with respect and courtesy'. I read that statement as an express promise that employees will be so treated by [the appellant] itself, and those within the company for whom it is responsible. However, if such a promise is not expressly made, it is at least implied.

There is also an express promise that 'all people within the JBWere team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member' (surely including a financial adviser) 'feel offended, humiliated or intimidated in any work related situation and where that reaction is reasonable in the circumstances'. As office manager, Mr Sutherland arguably had more onerous responsibilities in this regard than other employees. But his conduct broke that promise.

His Honour said that the harassment issues overlapped with other issues of health and safety, in which respect he agreed with counsel for the respondent that the appellant's failure to provide a secure and safe workplace left the respondent "festering in an environment of harassment and intimidation for an extremely lengthy period of time".

269 Fourthly, his Honour identified a binding term of the contract of employment which was sourced in the grievance procedures in WWU to which I have referred in par 196 above. He referred to the door being "wide open at all times for people to discuss any issue", and to the appellant having been "built on the principle that it is a team with common interests and ideals" as stated in WWU. His Honour identified what he described as a promise in the appellant's statement of a commitment "to make sure that anyone who makes a genuine complaint will be able to discuss the concern confidentially, will be supported by the firm and is not penalised in any way". He noted that the respondent was able to discuss his concerns confidentially, and said that there could be no complaint about that aspect of the appellant's conduct. His Honour continued:

However, the promise of support necessarily includes, at least, an implied promise to carry out an adequate and timely investigation into the merit of any complaint or grievance, and to endeavour to achieve a result that will resolve the problem and accord with [the appellant's] culture of each member of the team being 'able to work positively and productively', and be 'treated with respect and courtesy'. That did not happen in this case. The result was to exacerbate the stress that [the respondent] was already suffering as a result of Mr Sutherland's conduct.

270 The means by which his Honour identified the acts or omissions of the appellant which constituted a failure to observe the contractual term drawn from the grievance

procedure in WWU were to set out lengthy passages from the submissions of the parties, to accept the submissions made on behalf of the respondent, and to hold that the submissions made in response on behalf of the appellant did not meet the respondent's "criticism". His Honour said that counsel for the respondent submitted the investigatory steps taken by Ms Jowett 'were manifestly inadequate' and itemised the following matters:

... during the 5 month period during which Ms. Jowett had conduct of the investigation the following occurred:

- (a) although Ms. Jowett had a lengthy conversation in early August 2003 it was not until some 10 weeks later (on 15 October 2003) that Ms. Jowett had her first face to face meeting with the [respondent] and Mr. Heath in Sydney;
- (b) no steps were taken to arrange any other meeting off-site in Canberra on an urgent basis;
- (c) upon receiving the complaint no effort was made to stand down either Mr. Sutherland or the [respondent] on pay pending the investigation;
- (d) the first meeting or conversation with Mr. Sutherland did not occur until 27 August 2003 (some 4 weeks after the written complaint was received);
- (e) the first time Mr. Keogh, a key player in the complaint, was even contacted was on 8 November 2003 (some 3 months after the complaint was received);
- (f) Ms. Dal Bon was never contacted (and Mr. Heath never passed on the complaints that Ms. Dal Bon had made concerning her view of Rod Sutherland's behaviour being inappropriate);
- (g) no other members of the Canberra Office were interviewed about the [respondent]'s allegations of harassment and bullying;
- (h) a short conversation with Ms. Trish Barber occurred at the end of August 2003 but she was not asked about [the respondent]'s complaints in particular;
- (i) the original conversation with Mr. Evans in early August 2003 about the proper interpretation of the Team DKN Business Plan took place in circumstances where Mr. Evans had not even seen the written complaint;
- (j) no investigator was appointed to ascertain what had occurred in relation to the reallocation of Ms. Dal Bon's clients and whether it contravened the conflict of interest policy of the Respondent and/or the Team DKN Business Plan;

- (k) Ms. Grunbaum (Team DKN assistant) was never interviewed despite the fact that a particular complaint was made about Mr. Sutherland's treatment of her;
- (l) a short conversation with Mr. Dorian Bontempelli about the Barter incident took place in late October 2003 but Mr. Bontempelli was not asked any questions about the other allegations made by [the respondent]; and
- (m) the tapes containing conversations concerning the Barter incident were received but neither transcript nor any notes of the content of those tapes has ever been produced.

His Honour said that the submission made on behalf of the respondent continued as follows:

The only investigation ever undertaken by Ms. Jowett into the client reallocation was an inquiry by her of Mr. Sutherland on 27 August 2003. In response, Mr. Sutherland wrote down on a piece of paper the way in which he had distributed Ms. Dal Bon's clients and, apparently, Ms. Jowett was satisfied with his explanation.

On the basis of the above steps, Ms. Jowett concluded her "investigation" and wrote to the [respondent] ... in December 2003. Amongst other things, Ms. Jowett stated that she had formed the view that the allocation of Ms. Dal Bon's clients was "appropriate" and belittled the [respondent]'s psychological symptoms as simply feelings of being "distressed and upset on occasions".

The letter referred to a series of recommendations and actions that the Respondent had taken following the investigation of the [respondent]'s complaint. However, during cross-examination, most of the alleged recommendations were procedures that had already been in place (eg visits by retail senior management) or simply untrue.

It was the appellant's shortcomings as identified in these submissions that his Honour held constituted a breach of the implied promise to carry out an adequate and timely investigation into the merit of the respondent's complaint, and to endeavour to achieve a result that would resolve that complaint.

271 His Honour rejected the respondent's allegations under the TP Act. He held that the respondent had not proved that he sustained any loss as a result of participating in the establishment of the DKN Partnership. He had not proved that any reduction in his income was the result of that participation. To the extent that the respondent's case was based upon

representations said to have been made by, or on behalf of, the appellant about the redistribution of the client service by an advisor departing from a partnership, his Honour held that the respondent had not proved that he would have embarked on a more profitable cause had he not believed that the “exit strategies” outlined by Mr Sutherland, and for which the DKN Partnership Business Plan provided, would be honoured.

272 The trial Judge then turned to the matter of causation apropos the three breaches of contract (arising from provisions of WWU) which he had found. His Honour did not approach the question by attempting to identify what consequences had flowed from each of those categories of breach of contract: rather, he said it was “neither possible nor necessary to separate the effects of the separate breaches”. But he was required to deal with a submission made on behalf of the appellant that the psychological problems which affected the respondent (and which his Honour held led to the respondent’s loss of employment) were caused not by the identified breaches of contract, but by Mr Sutherland’s actual client reallocations (which his Honour held not to involve any breach of contract) and the respondent’s deep sense of disappointment at those reallocations. In this area his Honour returned to the medical evidence, and placed great weight on the opinions of Drs Jamieson and Lowden. Taking the expert evidence as a whole, his Honour found that the respondent’s psychological problems stemmed from the “aftermath” of Mr Sutherland’s reallocation decision, in the way that the respondent was treated by Mr Sutherland, and in the failure of Ms Jowett and others to give him proper support in handling his problems with Mr Sutherland.

273 The trial Judge next dealt with *Baltic Shipping Company v Dillon* (1993) 176 CLR 344. His Honour held that *Baltic Shipping* did not stand in the way of an award of damages in the case before him, because the appellant’s breach of contract occasioned the respondent more than disappointment and distress: it led to him suffering a recognised psychiatric illness, namely, a major depressive disorder. Following McHugh J in *Baltic Shipping* (at 405), his Honour held that the respondent’s psychiatric illness was a personal injury and was, therefore, within the category of loss and damage which was compensable when caused by a breach of contract.

274 An alternative basis for holding the present case to be outside the class of cases in

which breach of contract damages would not be awarded for disappointment and distress propounded by his Honour was that the present case should be regarded as coming within the very exception upon which the judgment of the High Court in *Baltic Shipping* itself turned. The exception was that of a contract which contained a promise that the promisor would not cause the promisee, or would protect the promisee from, disappointment of mind, such as in the case of contracts whose object was to provide a service or facility conducive to peace of mind, tranquillity of environment or ease of living: see Brennan J in *Baltic Shipping*, at 370. Because the trial Judge held that the respondent's psychiatric illness was a personal injury, he said that it was not necessary for him to reach a final view as to whether the relevant provisions of WWU had the purpose of providing assurance to the appellant's employees concerning the manner in which they would be treated, and thus had the object of providing peace of mind.

275 In the next section of his Honour's judgment, he dealt with the matter of remoteness of damage. His Honour referred to two cases in tort – *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 and *Rowe v McCartney* [1976] 2 NSWLR 72 – for the proposition that it was not necessary that the particular damage suffered by the respondent need have been foreseen, or would have been contemplated: it was sufficient that damage “of that general type” was foreseeable or in contemplation. He continued:

In the present case, as I have pointed out, the relevant contractual obligations are intended to provide peace of mind to existing and prospective [the appellant] employees. It must be taken to have been within the contemplation of the parties that, if the obligations were not fulfilled, the particular employee to whom the obligations were owed might become upset, stressed and disturbed. It is notorious that stress and disturbance of mind may lead to a psychological disability. It may be unusual for disturbance of mind to lead to a psychological condition as severe as that suffered by [the respondent]; there is no evidence on the point. However, that is a statement about the extent of the injury, not its type. This is not a case, as in *Rowe v McCartney*, of a mental disability arising out of irrational guilt feelings that had only a tenuous connection with the plaintiff's cause of action. This is a case of a mental disability that was a particularly severe manifestation of the very type of detriment that the WWU promises were designed to prevent.

It was in these terms that the trial Judge held that the damages suffered by the respondent were not too remote.

276 Finally, his Honour calculated the damages which he would award to the respondent.

His Honour identified three components: loss of past earnings, loss of future earnings and general damages. The actual sums awarded by his Honour are not controversial in the appeal.

INCORPORATION OF WWU INTO CONTRACT OF EMPLOYMENT

277 The appellant's first main ground of appeal was that the trial Judge erred in upholding the contention in par 8A of the Statement of Claim that it was an express term of the contract of employment that the appellant would not treat the respondent other than in accordance with WWU. It sought to identify six categories of error said to have been made by his Honour.

278 First, the appellant contended that the trial Judge had relied upon the "subjective intention" of the parties, including (in the case of the appellant itself) some of the managers who had given evidence. I referred briefly to this aspect of his Honour's reasons at par 261 above. The respondent contended, and I accept, that his Honour's references to the views of certain witnesses as to the binding effect of WWU were confirmatory of the decision which he reached, rather than deliberative in the primary sense. In the appeal, the respondent did not seek to rely upon subjective intention as a basis for supporting the inference which his Honour drew.

279 Secondly, the appellant contended that the trial Judge had placed undue reliance upon the view that many of the provisions in WWU related to matters which one would normally expect to find covered by a contract of employment. It pointed out that there was no evidence before his Honour sufficient to justify such a generalisation. It pointed out that, if custom were to be relied upon, the content of the employer's customary obligations, particularly with matters of occupational health and safety, was significantly different from that stated in WWU. It followed, according to the appellant, that the general custom of which the trial Judge was prepared, in effect, to take judicial notice fell short of the contractual obligation which his Honour distilled from WWU.

280 I have referred to the relevant passage in his Honour's judgment at par 262 above. While his Honour identified different categories of statement made by the appellant in WWU, it is not clear which statements he would place in which category. One category is that of

“obligations customarily found in employment contracts”. If that is a reference to the provisions of WWU which gave quantitative expression to common employment entitlements, such as those relating to various kinds of leave, I would agree that the provision of statements in those terms to the respondent, contemporaneously with the letter offering him employment, would reasonably have been regarded by him as intended to constitute part of the consideration offered by the appellant, and that the provisions in question would, therefore, be contractually binding upon the respondent’s acceptance. Another category in this passage of his Honour’s judgment is that which consists of “the explicit promises” made by the appellant in WWU. If by “explicit” his Honour intended a reference to the specifically quantified entitlements of the kind to which I have just referred, I would respectfully agree with him. If, however, by the expression “explicit promises” his Honour intended a reference to that part of his reasons in which he described provisions of WWU commencing “we will...” (and the like) as promissory, I could not, with respect, accept that such language alone, and without consideration of the context otherwise, would always be apt to give contractual force to the relevant provision.

281 Thirdly, the appellant pointed to the provision in WWU (to which I have referred at par 216 above) under which it reserved to itself the right to vary, change or cancel the information stated in WWU. It contended that for one party to be at liberty unilaterally to alter the terms in which its obligations to the other party are stated would be fundamentally inconsistent with the notion that a contract existed between them. However, the respondent’s case was not that the particular provisions of WWU as they existed at the time of the offer of employment were incorporated into his contract of employment; rather, the term alleged was that the appellant would not treat him other than in accordance with its policies as amended from time to time, including those set out in WWU. This way of putting things effectively sidestepped the appellant’s submission. The prospect of amendment from time to time was not only permitted by the term which the respondent alleged: it was specifically contemplated.

282 Fourthly, the appellant contended that the trial Judge had erred in failing to identify what was described as a secure basis for incorporation. It pointed out that the only document which the respondent had signed was his letter of offer, and that that document said nothing about WWU. It followed, according to the appellant, that there was simply no satisfactory

point of anchorage, as it were, between the contract of employment and WWU.

283 There are two levels at which I would deal with this submission. At the general level, I would reject the proposition that the absence of any specific reference to WWU in the respondent's letter of offer should of itself have been fatal to the respondent's case in this respect. The question which his Honour had to decide was what the parties intended. That question was to be answered from a consideration of all of the relevant circumstances. It was, I consider, a most relevant circumstance (as his Honour pointed out) that WWU had been sent to the respondent with his letter of offer. Even without reference in the letter of offer, had there been a single page attachment specifying particular entitlements (leave, superannuation, incentive payments etc), there could have been little doubt but that such provisions were intended by the sender of the letter to be incorporated into any contract arising from acceptance. On the facts of the present case, simple issues such as these have been clouded by the size and heterogeneity of WWU itself, but, at base, the contractual analysis remains the same. In my view, the contemporaneous provision of WWU was a circumstance proper to be taken into account in drawing the inference with which his Honour was concerned.

284 There is, however, a second level at which the appellant's submission should be considered. There was one provision of the letter of offer which, according to his Honour, provided a link to WWU. It was the paragraph to which I have referred at par 176 above. It formed the basis of a submission made by the respondent that the facts were analogous to those which came before the Full Court in *Riverwood*, and that a like result, in point of contract, should follow. The appellant submitted that the statement in the letter of offer that it would issue office memoranda and instructions (or had done so) was insufficient to establish incorporation of WWU. I agree, and I consider that his Honour was wrong to apply *Riverwood* in the circumstances of the present case.

285 In *Riverwood* the trial Judge had found, and the Full Court (by majority) agreed, that a term entitling the respondent to a redundancy payment in certain events was incorporated into the contract of employment between the appellant and himself. The incorporation was the result of the express agreement of the parties, albeit that, as a matter of evidence, it was necessary to infer the making of that agreement. As I read the reasons of their Honours in the

majority, there were two circumstances of critical importance to the conclusion that such an agreement should be inferred: first, the strong predominance of provisions beneficial only to the employee in the appellant's Policies and Procedures Manual; and secondly, the scope for the word "abide" in the respondent's contract of employment to convey also the meaning that he would accept the benefits to which he was entitled under the manual and that, correspondingly, the appellant itself would comply with the provisions of the manual, at least to the extent that they purported to grant those benefits.

286 As I indicated in par 262 above, the trial Judge considered that there was "not much difference" between the wording in the contract in *Riverwood* and the wording in the respondent's letter of offer in the present case and that the secondary document in both cases purported to impose obligations on the employer, some of which were of a kind customarily found in employment contracts. Thus his Honour held that the "approach" taken in *Riverwood* was applicable in the present case.

287 With respect to his Honour, I would have no difficulty following the *approach* which was taken in *Riverwood*. That approach was to consider all the facts and circumstances surrounding the making of the contract in question, including the content of the documents which were controversial, for the purpose of considering whether the term contended for by the respondent had been established as a matter of inference. Beyond that, I read *Riverwood* as a judgment which turned entirely on its own facts. Little is to be gained, I consider, by picking apart the factual matrix in *Riverwood* with a view to lining up selected elements thereof with individual elements of the matrix in the present case thought to be corresponding in some sense. *Riverwood* was decided the way it was because their Honours in the majority agreed with the trial Judge that the parties intended a particular provision to be a term of the contract of employment. Necessarily, they arrived at that conclusion after considering every fact and circumstance that had the potential to assist in the process of inference. It would be quite inappropriate, I consider, for a later court to seize upon individual elements of their Honours' fact-finding reasoning as though, somehow, they would have some binding or even persuasive impact upon the fact-finding process in which it was itself engaged.

288 A significant respect in which the facts of the present case differ from those in *Riverwood* is that, here, the secondary document upon which the respondent relies was given

to him at the time he was offered employment, whereas there the appellant's manual was not, at least specifically, given to the respondent employee. Necessarily, in *Riverwood* the "abide by" term was not only important: it was critical. Without it, the respondent's case for express incorporation would have been very different. In the present case, the respondent has the benefit of the circumstance that the appellant provided him with a copy of WWU at the very time it was offering him employment on stated terms. On the other hand, I could not accept a process of reasoning that started with the superficial similarity between the two cases constituted by the existence of a formal letter and a secondary document, that held there to be not much difference between "abide by" and "comply with", and that concluded with the view that *Riverwood* was an applicable authority in favour of the respondent in the present case. I do not suggest that his Honour below necessarily took that approach, but we were invited to do so by counsel for the respondent. The approach would, I consider, be to subordinate a proper consideration of all the relevant circumstances in the present case to the kind of cherry-picking exercise which I criticised above.

289 I will conclude my consideration of *Riverwood* by returning to the two critical circumstances in that case which I sought to identify in par 285 above. If it should be necessary to distinguish *Riverwood*, I consider that it is proper to do so with respect to each of those circumstances. Manifestly, WWU could not be described as predominantly concerned to specify benefits or entitlements of the employee: it does specify many such entitlements, but it contains numerous directions and requirements which might be considered burdensome for the employee and/or beneficial for the employer. Indeed WWU cannot be categorised as either predominantly this or predominantly that. While it does contain "office memoranda and instructions", it likewise contains many provisions which could not be so described. As to the suggestion that the kind of reasoning which their Honours in the majority in *Riverwood* applied to the term "abide by" might likewise be applied to the term "comply with" the relevant policies and practices in the present case, I need do no more than refer to the contrast between these very terms which appears in the reasons of Mansfield J (177 ALR at 222 at [146]). As his Honour pointed out, that "abide by" meant no more than that the respondent "comply with" was the very contention of the appellant in that case: a contention which was unsuccessful.

290 Returning to the provision of the respondent's letter of offer to which I have referred

in par 176 above, I am bound to say that I think it came to occupy a position much closer to centre stage than its true importance warranted. This may have been because the respondent's advisers saw in the provision the potential to obtain leverage from *Riverwood*. However that may be, I regard the provision as entirely neutral to the resolution of the question whether any – and if so which – of the provisions of WWU should be regarded as contractually binding. I cannot think that the hypothetical new employee reading the provision for the first time – and without an antenna keenly tuned to signals emitted by cases decided by the Federal Court – would do otherwise than take the provision as an unsurprising statement that his or her future employer had issued, and would in the future issue, office memoranda and instructions with which he or she would be expected to comply as and when they were applicable. It is in the kind of provision that would be unsurprising in any similar letter written on behalf of any intending employer in virtually any industrial situation.

291 Fifthly, the appellant submitted that the trial Judge failed to have regard to the whole of WWU. If such regard had been had, his Honour would have noticed that large parts of WWU were purely informational, and that others spoke in terms of goals, values, aspirations or general policies. It was said that WWU as a whole could not be regarded as promissory or otherwise as giving rise to contractual obligations, and that the more likely interpretation of the parties' reasonable intentions was that the whole document stood outside the contract of employment.

292 It is not clear that the trial Judge held that the whole of WWU was incorporated into the respondent's contract of employment. I have referred to the way his Honour did approach this subject at par 263 above. It would be wrong to say that his Honour did not take account of the whole document: indeed, as I have pointed out, his Honour did recognise that some provisions of WWU made a stronger, or at least a more obvious, claim for incorporation by nature of their subject matter. On the other hand, I am disposed to agree with the appellant that the terms of WWU are heterogeneous – both in content and in style – to such an extent as to render any attempt to classify them either as wholly contractual or as wholly non-contractual highly artificial. At one extreme WWU was the means by which the appellant apparently set out many – if not all – of what his Honour regarded (correctly in my respectful view) as quite commonplace conditions of employment in the nature of entitlements, such as leave of various kinds. At the other extreme, WWU contained many sections which were

manifestly informational only, as well as others which urged upon employees the adoption of a way of thinking, and a general pattern of behaviour, that conformed to the appellant's culture. The appropriate course, in my view, is to consider each of the particular obligations which, according to his Honour, were imposed upon the appellant by WWU, and to ask whether his Honour fell into error in those respects. There is little to be gained, I consider, by further wrestling with the question whether WWU should be regarded either as wholly contractual or as wholly non-contractual.

293 It is also significant that the respondent was asked to sign off only on certain specific aspects of WWU. Those aspects were not simply selected from various parts of the body of WWU: they were collected in a separate chapter specifically addressed to new employees which opened with an unambiguous message as to the importance, and relevance, of them. The limited nature of the formal sign-offs which the respondent was asked to execute, and which he did execute, was, I consider, a significant circumstance for the purposes of inferring what the parties intended on the question of which parts of WWU would be binding as part of the contract of employment. His Honour did not refer to those sign-offs at all. I consider that he was in error in that regard, not because a consideration of them would necessarily have led to a different result, but because, when approaching the resolution of a question of fact by a process of inference, he denied himself the assistance of facts which had been established as a matter of direct evidence and which bore centrally on the question to be resolved.

294 Sixthly, the appellant contended that the trial Judge was in error in treating the language of WWU as promissory. It pointed to many instances in which the language could not be so described, and to others in which passages superficially connoting obligation actually went no further than to provide information about an employer's duty arising otherwise (eg under statute). As with the previous point, this submission cannot be dealt with in the broad. The significance of the particular terms in which the appellant expressed itself in WWU should be considered separately with respect to each of the specific areas in which his Honour held WWU to be contractually binding.

295 I propose next to turn to those specific areas. The trial Judge held that the provisions of WWU concerning behavioural standards, such as those relating to health and safety, harassment and the grievance procedure, should be regarded as contractually binding on the

appellant. His Honour said that the appellant “trumpeted” those behavioural standards as reflecting its values and culture. Given that WWU appeared to impose legal obligations on the appellant in relation to other matters, his Honour saw no reason to doubt that it also did so in relation to “those provisions of the document that contain express promises about behavioural standards”. He held that the appellant might be held liable in breach of contract where it could be shown that, on no view of its conduct, had it responded to a problem or complaint in the manner “promised or assumed” in WWU.

296 Approaching the matter in this way, his Honour dealt with four respects in which the respondent proposed that the appellant was in breach of a contractual norm derived from WWU. The first related to “conflict of interest”, in which respect his Honour held in favour of the appellant, and the subject does not arise on this appeal. The remaining three related to health and safety, harassment and grievance procedures, and his Honour dealt with those matters in that order. For reasons which will become clear, I propose to consider first harassment, then grievance procedures, and finally health and safety. For the present, it will be sufficient if I say that I commence with harassment because the respondent’s allegations in that respect focused on the primary conduct of Mr Sutherland which, in effect, was the precursor of the other acts and omissions on the part of the appellant of which the respondent complained.

HARASSMENT

297 His Honour identified the harassment allegations made by the respondent as those set out in par 33A of the Statement of Claim (par 241 above). As his Honour pointed out, items (i) and (ii) related to the actions of Mr Sutherland directly, whereas item (iii) related to the inactivity of Ms Jowett and Mr Heath. As to the first two items, his Honour held that the appellant was vicariously liable for Mr Sutherland’s conduct. Strictly speaking, this was not a case of vicarious liability: the respondent’s case was that the appellant had made a direct promise that it would not, by its servants or agents, intimidate the respondent (etc). If any servant of the appellant intimidated the respondent, the appellant was thereby in breach of contract, according to the respondent’s case. In the hearing of the appeal, counsel for the respondent confirmed that his client’s harassment allegations should be so understood.

298 Looking first at the harassment provisions of the “Code of Conduct” chapter in

WWU, I cannot agree that they are relevantly promissory. A significant factor, in my view, is that they are to be found in a chapter entitled “Code of Conduct”, which carries the suggestion that the provisions in it specify the conduct required of employees, rather than make promises to those employees about the behaviour of other employees. Further, the actual terms of the paragraphs in question simply do not bespeak promissory intent. They seek to convey to the new employee something which is at once more fundamental and less normative than the specific conduct-based term which his Honour identified. As the words themselves make clear, the paragraph is concerned to identify the “culture” of the appellant. These were words of information, encouragement and perhaps education. At most they involved, at the highest level of generality, a kind of instruction to the new employee as to the standards which the appellant expected of him or her.

299 In my opinion, these paragraphs provide no scope for the inference, drawn by the trial Judge, that the parties intended the terms identified in the first two subparagraphs of par 33A of the Statement of Claim to be terms of the respondent’s contract of employment.

300 But the matter should not rest solely upon the terms of the two paragraphs to which I have just referred. The section in the “Sign Off” chapter of WWU headed “Procedures for Harassment – Concerns or Complaints” should also be taken into account. His Honour did not refer to that section. It was significant for two reasons. First, no relevant sign-off form, executed by the respondent, was in evidence before his Honour. Thus, although WWU itself contemplated that new employees may be asked to sign some kind of acknowledgement about the appellant’s harassment policies (the exact terms of which did not appear), there was no evidence that the respondent had ever done so. The respondent’s case was not, therefore, assisted by this added element of definition, and formality, which existed in the case of some other subjects dealt with by WWU.

301 Secondly, the existence and terms of the appellant’s procedures for harassment – contained in the sign-off chapter of WWU – should, I consider, have been taken into account at the point of drawing an inference about the parties’ contractual intentions. The relevant provisions, in my view, are quite inconsistent with the notion that the appellant made an absolute promise that no employee would be harassed by another employee. They substantially duplicated the two general paragraphs to which I have already referred, but went

further. To have “an environment free from harassment and its consequences” was listed as one of “the aims of our harassment procedures”. That “each member of the team is treated with courtesy and respect” was referred to as a “guiding principle”. In the procedures themselves, the first step was for the putative victim to tell the putative harasser that his or her behaviour was unacceptable, and to ask him or her to stop. It may be, and the procedures imply that, ideally, it should be, that a complaint of harassment would be successfully resolved at that first level. If so, could it be suggested that, at the same time, the appellant itself would be contractually liable in damages because the initial act of harassment was something which it had promised would not occur? I think not. Likewise, it will be seen that the procedures contemplated that the putative victim’s complaint might be resolved at a higher level up the chain. Here too, the existence of a procedure which assumed the existence of a harassing party and a victim, and which allowed for the former’s complaint to be resolved (indeed, had the objective of achieving that end) would sit most uncomfortably alongside a contractual term by which the appellant, as employer, made an absolute promise that no harassment would occur in the first place. The procedures concluded with a listing of the “possible outcomes”, including an apology, agreed behaviour, dismissal of the person instigating the harassment, leave for either person, counselling support and/or increased awareness of the firm’s harassment policy. I cannot accept that a new employee would have any reasonable basis for reading into the document an implicit promise by the appellant that harassment would not occur under any circumstances. Rather, I consider that, when read fairly and objectively, the relevant provisions of WWU recognise that harassment – however regrettable – might occur from time to time and were concerned to provide a means of resolution that was both effective and conscious of the interpersonal sensitivities commonly involved in such matters.

302 In the circumstances, I consider his Honour ought to have rejected the proposition that the terms set out in subpars (i) and (ii) of par 33A of the Statement of Claim were terms of the respondent’s contract of employment.

303 The third subparagraph of par 33A of the Statement of Claim relates to the appellant’s own conduct in protecting its employees from harassing or bullying conduct on the part of other employees. By reason of the provisions of WWU to which I have referred above, it is, I consider, impossible to find that the parties intended the appellant’s obligation in this regard

to be any different from that set out in the procedures document in the sign-off section to which I have referred. Clearly the protection of employees from harassing or bullying conduct on the part of their colleagues was a central aim of the appellant's procedures. That the appellant would, beyond making those procedures available in appropriate cases, itself "protect" the respondent from harassing or bullying conduct (even where such an obligation is said to be limited to steps that were "reasonably practicable") is, I consider, a proposition beyond anything stated in WWU.

304 For the above reasons, I would hold that the case which the respondent sought to make out in par 33A of his Statement of Claim should have been rejected.

CONCERNS OR GRIEVANCES

305 The provisions of WWU upon which the trial Judge relied to identify a contractual term on the subject of procedures for handling grievances are set out at par 196 above. They are to be found within the chapter entitled "JBWere Team Support Package". That chapter deals with a miscellany of topics, brought together, it seems, by reason of the common thread that they all, in one way or another, relate to ways in which the appellant "supports" its staff. In some parts of the chapter one finds clear statements of entitlement, for example, "you are entitled to 20 days paid Annual Leave per year of service". I agree with his Honour that, by reason of the nature of the subject-matter, the precision of the entitlement and the use of the word "entitled", expressions such as this are prima facie contractual. One remove from this situation are the instances in the chapter where entitlements are stated, but are subject to approval, or the like, by the appellant before having concrete operation in the case of a particular employee. Various aspects of the support which the appellant provides for the undertaking of additional study or training are in this category. I think it would be appropriate to regard these provisions of the chapter as contractual, but where the receipt of the benefits contracted for is subject to conditions or to the exercise of some discretion.

306 On the other hand, many provisions of the chapter should be regarded as no more than the provision of information about the ways in which the appellant supports its staff, and stop short of making promises, express or implied. The provision of summary details about the appellant's professional development program, about the links on the appellant's web site to encourage creative thought and contribution, about security facilities in the various buildings

which the appellant occupies and about practical steps to avoid deep vein thrombosis, for example, are in this category.

307 The provisions upon which the respondent relies in presently relevant respects are to be found under the sub-heading “Concerns or Grievances” in a section of the chapter headed “Support for Personal Issues”. The sub-section in question follows one headed “Feeling Uncomfortable?” and precedes others headed “Integrity”, “Privacy”, “Welcoming Diversity” and “Employee Assistance Program Providers”. The only text under the sub-heading “Integrity” is a note referring the reader to another chapter in WWU. There is also a sub-heading about equal opportunity and the prevention of harassment, but there is no text beneath that sub-heading.

308 Even within this limited section of the chapter, the nature of each subject dealt with, and the language in which it is expressed, make generalisations about contractual appropriateness difficult. Under “Privacy”, a fairly detailed policy is set out which deals with the collection, maintenance and disclosure of personal information about employees and others. Here some rather fine distinctions are made (such as between a statement that the appellant will comply with the policy in relation to contractors, consultants and unsuccessful job applicants and a following statement that it will “endeavour to adhere to” the policy in relation to employees). There is an apparently comprehensive listing of those internal departments and external organisations to which personal information may be provided in certain circumstances. In many places here, the language is what his Honour would describe as promissory – the appellant repeatedly states that it “will” do certain things, for instance. I can well understand that a reasonable reader in the position of a new employee joining the appellant’s staff would regard such statements as promises forming an element of the consideration passing to him or her in return for entering into the appellant’s service.

309 By contrast, the text appearing under the sub-heading “Feeling Uncomfortable?” contains no statement by the appellant of what it will or will not do. It is almost entirely advisory with respect to support facilities which are available within the appellant’s organisation, and then only in very broad terms. For example: “...often the best first step is to talk it over with someone who can provide confidential advice and support.” There is an emphasis upon the sensitivity of the subjects with which the sub-section is implicitly

concerned, and upon the need for confidentiality. Because of the approach which his Honour took to similar words in the sub-section on grievances and concerns, the following sentence may be significant: “we are committed to make sure that anyone who has a genuine concern will be supported, and the issue will be handled with discretion”. In context, this cannot, I consider, be treated as a promise intended to have contractual effect. It is a statement of fact – none the less so because the fact with which it is concerned is the appellant’s commitment to provide support to an employee in a difficult and potentially embarrassing situation.

310 Turning to the “Concerns or Grievances” sub-section itself, on no view could any statement in the first, second or fourth paragraphs be regarded as conveying a promise by the appellant to the hypothetical, reasonable, new employee. Those paragraphs flow naturally from the subject-matter of “Feeling Uncomfortable?” and inform the reader of a general organisational culture which might best be described – without in any sense implying trivialisation – as caring and sharing. Indeed, the very thrust of the four paragraphs strikes me as intended to convey to the reader an idea of the culture of the organisation which he or she is about to join. References to wide-open doors and to the “family” way of operating are, on my reading of the paragraphs, graphic and striking metaphors which are quite at odds with the suggestion that contractual promises are either express or implied.

311 Critical to the approach of the trial Judge in this part of the case was the sentence in the third paragraph: “We are committed to make sure that anyone who makes a genuine complaint will be able to discuss the concern confidentially, will be supported by the firm and is not penalised in any way.” His Honour held that that was a promise, ie that the appellant intended to say, “We promise that anyone who makes a genuine complaint will be supported by the firm”. With respect to his Honour, I do not so read the sentence, at least literally. It is a statement of fact: the appellant’s commitment. If the state of someone’s mind is no less a matter of fact than the state of his or her digestion (*Edgington v Fitzmaurice* (1885) 29 CH D 459, 483 per Bowen LJ), I cannot see why the commitment of a person or, as here, a firm should be placed in any different category. Is it either appropriate or desirable to move beyond the literal and to recognise in these words a more powerful secondary message that the appellant would in fact do the things to which it stated a commitment? In context, I do not think so. The notion of a non-promissory commitment is quite familiar in everyday language. That the appellant should be prepared to express itself only in terms of its

commitment should not, I consider, be viewed with scepticism by a court, or be implicitly treated as though meaning so little in practice as to justify an implication that something more specific, and more contractually binding, must surely have been intended. WWU is the appellant's document, and if it chose to express itself only as having a particular commitment, I do not believe that a court should in effect stretch that statement beyond its actual terms into the realm of contractual promise.

312 That the third paragraph should be read according to its actual terms, and not as involving a promise is, I consider, strongly supported by the context. This sub-section of the chapter is dealing with issues of a variety which the drafters of WWU could scarcely have hoped to anticipate. Of their nature, issues of the kind that the sub-section appears to contemplate may well be sensitive to the individual and embarrassing to the organisation. That the appellant should be committed to providing support to an employee with a genuine complaint, while stopping short of promising to do any particular thing, is, I consider, at least as obvious a reading of the third paragraph as that favoured by his Honour. That reading is favoured by the statement in the fourth paragraph that the applicant's way of operating is a "family" one. Although used metaphorically, that word specifically calls up an image of the paradigm case of a relationship in which statements are not generally intended to have contractual effect. It reinforces the concept of "commitment" which I favour. In a family environment one can well imagine a parent telling a son or daughter of a commitment – even a firm commitment – to provide him or her with a quality education. That would reasonably be received by the prospective student as a statement of an existing state of mind, not as a promise. Unless the terminology of WWU is to be dismissed as mere puffery – something which has never been suggested – I believe that the "family" metaphor provides a useful context within which to approach the task of the construction of the third paragraph.

313 Finally, a significant circumstance in the mix of considerations available to assist the court in drawing an inference as to the parties' intentions about the grievance procedure term is the lack of definition in the words used in the third paragraph in the sub-section. That the appellant might have intended to make a promise that a genuine complainant would be "supported by the firm" is, I consider, most unlikely. What would such a promise mean in practice? What content would the notion of "support" have? Would it mean that the firm would necessarily take the complainant's side as it were? One could give content to a

promise that a complainant would not be penalised for making a complaint, but the same could not be said of the bare promise to provide support. There is nothing in the sub-section that would permit one to identify exactly what act or omission on the part of the appellant would give rise to a breach of such an assumed promise. If, on the other hand, the expression of commitment is read as it stands and not stretched into the realm of contract, these issues do not arise.

314 Thus I would not infer that the third paragraph of this sub-section should be read as a promise – intended to be contractually efficacious – by the appellant in the circumstances posited. I consider, with respect, that the trial Judge was wrong to have done so.

315 But his Honour did not leave the matter there. An irony, perhaps, of the way his Honour dealt with the matter of identifying the relevant term of which he found the appellant in breach may be seen in the circumstance that the conversion of the third paragraph into a contractual promise corresponding with its actual terms was not sufficient for the purpose, for the very reason that I canvassed two paragraphs ago in these reasons. In order to give practical utility to the promise which he identified, his Honour was obliged to take a further step, and to hold that more specific promises were necessarily implied. The trial Judge held that the promise of support “necessarily includes ... an implied promise to carry out an adequate and timely investigation into the merit of any complaint or grievance, and to endeavour to achieve a result that will resolve the problem ...”. With respect to his Honour, I believe that the articulation of such a term perhaps owed more to the presentation of the facts of the present case before him at trial than to a construction of WWU as it stood at the time, and against the circumstances existing, when the respondent accepted the appellant’s offer of employment. I shall, however, deal with the case for the implication of such a term according to conventional tests.

316 Approaching the matter in a way which is broadly conformable with the respondent’s position, and treating his letter of offer and WWU as together providing comprehensive written terms of his contract of employment, the question whether additional terms should be implied may be considered by reference to the tests in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283. With respect to the second of their Lordships’ conditions – business efficacy – the argument that that condition is satisfied in the present

case would necessarily be based on the proposition that a contractual term under which the appellant did no more than to promise to support a genuine complainant was ineffective. Here arises the irony to which I earlier referred: his Honour inferred that the parties agreed to include into their contract an express term that would be ineffective. However, if they had overtly agreed upon such a term, I agree that it should be regarded as ineffective without elaboration or further detail. In that sense, if the point is reached where the term is inferred, I would regard the second condition in *BP Refinery* as having been satisfied.

317 Turning to their Lordships' third condition, I could not hold that the inclusion of the term proposed by his Honour was so obvious that it went without saying. Obviousness, of course, must be considered as at the time when the contract was made, and not with the benefit of hindsight provided by particular facts which have subsequently become controversial. If the intelligent informed bystander had wondered, at the relevant time, what was obviously intended by the assumed promise of support, I think that he or she might have contemplated a number of possibilities. He or she might have said: "Well, it will depend on the circumstances. In some situations a period of absence from work might be called for; in others a re-configuration of duties; in others a confidential reconciliation meeting between the people concerned; in others a referral to a professional counselling service." He or she might have thought also that the personal circumstances of one of the parties immediately involved might be such as to point to the wisdom of a particular approach: if the putative harasser, for example, were in the advanced stages of pregnancy and about to commence a period of maternity leave, the bystander might think a rather obvious approach would be to avoid troubling her with the complainant's accusations until a later stage. At the end, I consider that the bystander would be quite incapable of formulating an alternative, more specific, variant of the assumed promise to provide support, and I can think of no reason why he or she would regard his Honour's terms as any more obvious than others which might cross the contemplative mind.

318 As to the fourth condition in *BP Refinery* – the necessity for clear expression – I accept, of course, that his Honour's term is stated in a way that is clear as a matter of denotation. I do not, however, think that the fourth condition should be regarded as having been satisfied by that circumstance alone. The whole point of implying a term in the circumstances is to provide clarity and definition to the written terms of the contract in a

concrete situation – ie as a matter of connotation. If the term proposed to be implied does not achieve this, then one is not solving the problem sought to be addressed by the process of implication. In the present case, I consider that the term formulated by his Honour raises as many questions as it answers. It introduces qualitative elements in the requirement that the investigation be “adequate and timely”. It incorporates much uncertainty by the concept of the appellant “endeavouring” to achieve a resolution. With respect to his Honour, save for the limitation of the promise to the conducting of an investigation, it is hard to see that his implied term would more than marginally add to the clarity with which the assumed express term is expressed. I do not consider that the implied term would satisfy the fourth condition in *BP Refinery*.

319 As to the fifth condition in *BP Refinery*, at first glance it does not appear that the term proposed by his Honour would be in contradiction of any express term in the contract. But, upon examination, the question is not, I consider, so easily resolved. As is clear from the third paragraph under the heading “Concerns and Grievances”, one factual context to which it was contemplated that the paragraph would potentially apply was that of harassment. The respondent’s own complaint on 28 July 2003 was in one of its two main dimensions concerned with harassment. WWU in fact contained a procedure under which complaints of harassment would be dealt with. The respondent was informed of the existence of that procedure at the same time as he read the provisions of WWU presently under discussion. At this point it is necessary to identify a particular aspect of the respondent’s case. In par 33A of his Statement of Claim, the respondent alleged that it was a term of his contract of employment that he would not be intimidated or harassed (or the like) and that the appellant would protect him from such conduct. I have dealt with that allegation in the previous section of these reasons. He made no allegation which in terms at least, sought to call up the appellant’s “Procedures for Harassment – Concerns or Complaints”. On the other hand, in par 33 of his Statement of Claim he alleged that it was an express term of his contract that the appellant would comply with its “grievance handling procedure”, and in that respect would “act in a timely manner”. If there were any such procedure in evidence it was not referred to by his Honour, and is not to be found in WWU. One thus has the curious situation in which, if the Statement of Claim and his Honour’s reasons are a reliable guide, the respondent did not rely on (and his Honour did not refer to) the procedure which did exist, while the respondent made allegations based on (and his Honour implied) a procedure which did not

exist.

320 Insofar as the respondent's complaint of 28 July 2003 was concerned with Mr Sutherland's reallocation, I can find nothing in WWU which required the appellant to conduct "an adequate and timely investigation". Importantly in the present context, insofar as the complaint was concerned with harassment and similar issues, I consider that the harassment procedure contained in the sign-off section of WWU should be regarded as the relevant, and specific, focus of the appellant's organisational (if not contractual) responsibilities. In other words, as a matter of internal construction, I do not think that the general "commitment" expressed in the short passage in WWU headed "Concerns or Grievances" provided a sufficient basis for implying a procedure different from that set out in the procedure specifically concerned with harassment and the like.

321 The procedure for dealing with complaints of harassment becomes an investigation only after the first four steps have been completed (see par 205 above). In the third of those steps, the "contact person" is required to "listen ... clarify the complaint ... provide you with information". Even later in the procedure, the language is that of conciliation and reconciliation. By contrast, relying upon the concerns and grievances provisions of WWU, his Honour's proposed term would require the appellant to give priority to the adequacy and timeliness of its investigation. At one level, those features of any investigation may be regarded as unexceptionable, but, in the context of a harassment complaint, timeliness of the investigation as such may not be the priority. I consider that his Honour's proposed term would have the potential to cut across the stepwise operation of the harassment procedures in WWU and should not – at least in a context such as that of the present case – be implied.

322 I recognise, of course, that the strict application of the conditions in *BP Refinery* is not always appropriate, especially in a case in which the parties have not made "a formal contract which was complete upon its face": *Hawkins v Clayton* (1988) 164 CLR 539, 571. However, even in a case such as the present,

... considerations of what is "reasonable", necessary to give business efficacy to the contract" and "so obvious that 'it goes without saying'" (*BP Refinery (Westernport) Pty. Ltd.; The Moorcock; Shirlaw v Southern Foundries* (1926) *Ltd.*) may be of assistance in ascertaining the terms which should properly be implied in the contract between the parties. (164 CLR at 571-572 per Deane J)

I do not apply the conditions in *BP Refinery* to the question whether a term should be implied into the respondent's contract of employment because I consider them to be an inflexible template by reference to which that question must be answered. I do so because they represent a sensible, conventional and well-accepted approach – at least as a starting-point – to the matter of implication. As it happens, even given the prospect that the respondent's letter of offer and the relevant provisions of WWU might not constitute the whole of the terms of the contract in question, I think that the fact that the circumstances of the present case fall short of satisfying three of the conditions referred to in *BP Refinery* is significant in resolving the question whether the contract contained a term of the kind which the trial Judge implied.

323 In the result with respect to the matter of concerns or grievances, I consider that the specific term which the trial Judge formulated as a result of inference and implication went beyond anything to which the parties actually agreed and anything which it would be proper to imply in the circumstances.

HEALTH AND SAFETY

324 Although the trial Judge did not consider separately whether the “health and safety” provisions of WWU were in themselves contractual, upon a consideration of all aspects of the case there are good reasons why the opening statement thereof should be so regarded. Fundamental to those reasons is the nature of the subject matter with which the provisions were dealing. That an employer is under an obligation, imposed by law, to take reasonable care for the safety of employees is well-established. There is no shortage of authority for the proposition that a source of that obligation is a term which the law implies into all contracts of employment, notwithstanding that the obligation arises also under the law of tort: see eg *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57; *Wright v TNT Management Pty Ltd* (1989) 85 ALR 442.

325 In *Lister v Romford Ice and Cold Storage Co Limited* [1957] AC 555, 587, Lord Radcliffe said:

The existence of the duty arising out of the relationship between employer and employed was recognized by the law without the institution of an analytical

inquiry whether the duty was in essence contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, express or implied. Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other.

Lister was, of course, a case which involved the employee's duty of care towards the employer, but it is, I consider, impossible to propound a satisfactory reason why the employer's duty should not be described in corresponding terms, at least as a matter of legal analysis. It is true also that Lord Radcliffe was in dissent in *Lister*, but the passage which I have set out was cited with approval by the Privy Council in *Tai Hing Cotton Mill Limited v Lui Chong Hing Bank Limited* [1986] AC 80, 107, and their Lordships' opinion, in turn, was relevantly treated as applicable to the employment context by Lord Bridge (delivering a speech with which the others of their Lordships concurred) in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, 303.

326 The employer's contractual duty arising at common law to provide a safe system of work etc is a duty to take that degree of care which is reasonable in all the circumstances and thus, in point of content, corresponds with the like duty arising under the law of tort: *Glass et al, The Liability of Employers*, 2nd ed, 1979, pp 1-2. The actual wording used in WWU departs somewhat from the terms in which common law obligation (whether in contract or in tort) would be expressed. At common law, the employer's obligation is to take all reasonable steps to protect the safety of employees. Under WWU, the appellant has said that it will take "every practicable step" to provide a safe environment. Subject to that difference (to which I shall return) the fact is that the health and safety provisions of WWU open with a broad statement of what the appellant will do which corresponds closely with its common law obligations. In relevant respects, therefore, WWU must be regarded as operating within a context in which the common law imposed legal obligations on employers of which the

appellant must be assumed to have been conscious. There is no reason why the appellant, in these provisions of WWU, should not be treated as providing specific articulation of those obligations, and as ensuring that those who entered its service well understood the nature and extent of them.

327 The next matter which I consider significant is the fact that the respondent signed off on the appellant's health and safety statement. I have referred to the sign-off form at par 202 above, and to the health and safety statement itself at par 206. These matters were not mentioned in his Honour's reasons, but I consider that they support his conclusion that the health and safety provisions of WWU were contractual. It is significant that the respondent was asked to state that he had read and understood the health and safety statement, and to acknowledge, in effect, that it outlined his obligations as a team member in the employ of the appellant. Where one party draws a document, provides it to the second party for his signature and includes a statement manifestly laying the groundwork for the second party later to be held to his knowledge and understanding of the document, there would rarely be any doubt but that the first party was intending the document to have contractual operation, if otherwise the context were appropriate. Because of that specific sign-off procedure, I prefer to identify the question which arose as whether the health and safety statement contained in the sign-off chapter to WWU was contractually binding on the appellant, rather than whether the more general provisions of the text of WWU were so binding. As it happens, there is little difference between the two and, I consider, no difference of any materiality in the present circumstances.

328 In the health and safety statement, there is a list of eight things which the appellant itself will do, seek to achieve, or the like. It is true that some are expressed more generally than might be ideal in a contract identifying hard and precise obligations. However, the common law contractual obligation itself finds expression in the broadest possible terms, and I do not think that the absence of a hard and specific edge to the language used in WWU ought to be disqualifying in this respect. Importantly, in my view, there follows a list of some nine things which the appellant's "team members" must do, or should seek to achieve. Some of these too are expressed in a general way, but again, I would not regard that as disqualifying. These two lists have the appearance of mutuality about them. There are some things which the appellant will do, and there are some things which its employees will do.

Consistently, it is said that the health and safety of all people within the appellant's operation "is a shared responsibility of the firm, and each team member". In order for these health and safety measures to be efficacious, the appellant was entitled to expect that its employees would treat the matters set out on the relevant list in the health and safety statement as obligations of theirs. Indeed, the sign-off form so described them in terms. Correspondingly, a new employee in the position of the respondent would, I consider, reasonably regard the identification of the things which the appellant itself would do as constituting a component of the consideration which moved from the appellant to him or her under the contract of employment.

329 Finally, I take account also of the ostensibly promissory nature of the language used in the opening words of the health and safety statement, and elsewhere therein. It is said that the appellant "*will* take every practicable step"; that the appellant "has a *duty* to provide and maintain"; and that the appellant "will *ensure* the effective implementation of health and safety procedures". Although, in a document such as WWU, grammatical indications such as these would not, of their own, be sufficient to convey contractual intent, in context, and together with the other considerations to which I have referred above, they provide some confirmation of the conclusion which I would otherwise be inclined to reach, namely, that the health and safety statement should be regarded as contractual.

COMPLIANCE WITH HEALTH AND SAFETY STATEMENT

330 The next question is whether, in its treatment of the respondent, the appellant was in breach of so much of the respondent's contract of employment as was constituted by the health and safety statement in WWU. At this point, it is necessary to return to par 8A of the Statement of Claim. There, the respondent alleged that it was an express term of the contract that the appellant would not treat him other than in accordance with its policies, including WWU, as amended from time to time. Although the terms of WWU as at the date when the contract was entered into were relevant for my consideration of the question whether those terms were contractually binding, at the point of considering whether the appellant was in breach of contract, it is necessary to look to the relevant terms of WWU in the form that they took when the breach is alleged to have occurred. That is the consequence of the ambulatory nature of the term alleged in par 8A of the Statement of Claim.

331 I have set out the terms of the health and safety statement contained in the sign-off chapter of WWU, at May 2002, in par 206 above. According to this evidence before his Honour, by mid-2003 (when, according to the respondent, the appellant failed to comply with the health and safety term), the corresponding provisions of the health and safety statement in WWU were as follows:

JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people.

Responsibilities

The health and safety of all people within JBWere is a shared responsibility of the firm, and each team member. In fulfilling this responsibility, the firm has a duty to provide and maintain, so far as is practicable, a working environment that is safe and without risk to health. This includes:

- maintain the workplace in a condition that is safe and healthy
- provide adequate facilities to protect the welfare of all people
- provide and maintain safe systems of work
- provide information and support to enable people to work in a safe and healthy manner.

The Firm

We recognise and accept our responsibilities to protect the health and safety at work of all members of the JBWere team. The Management of JBWere will endeavour to:

- provide and maintain a working environment (including equipment, machinery and systems of work) that is safe for all team members and without risk to your health
- provide adequate facilities for your welfare at work
- ensure that the use, handling, storage or transport of equipment, machinery or substances is safe and without risk to your health
- provide, in appropriate languages, information, instruction, training and supervision to enable you to perform your work in a manner that is safe and without risk to your health and the health of your colleagues
- observe all required responsibilities under the Acts and Regulations which apply to the finance industry.

Team Leaders and Managers

We believe the most efficient and effective way to create and maintain a safe and healthy work environment is to integrate OHS policies and procedures, particularly OHS risk management practices, into our management systems and workplace operations.

Our managers and team leaders play a pivotal role in making our OHS risk management policies and procedures actually work and ensuring they are effective. This includes putting in place procedures to monitor the health and safety of team members for whom they are responsible.

Accordingly, managers and team leaders are responsible to ensure workplace and work systems are safe and without risk to the health of their team and will therefore encourage all team members to discuss any occupational health and safety problems they encounter.

Our team leaders and managers will:

- consult with you on relevant health and safety issues in team meetings
- review specific responsibilities so that they are consistent with the firm's health and safety objectives, including OHS responsibilities in all position descriptions
- conduct quarterly walk-through surveys to ensure the safety of your work environment (see Hazard Management below)
- ensure team members are performing their roles safely
- report all incidents and accidents and forward reports to Human Resources so that health and safety standards can be monitored, using the incident/accident report form (see Hazard Management below)
- assist and encourage rehabilitation following an injury or illness (see Return to Work and Rehabilitation Program below)
- provide access to First Aid
- assist with health care for overseas business travel and expatriates.

JBWere Team Members

As team members, you have a responsibility to notify your team leader or manager of any potential hazards. In addition, you are also be required to:

- comply with the firm's health and safety procedures and directions
- effectively support and use items or facilities provided in the interests of health, safety and welfare
- report potential and actual hazards using the
- store materials and equipment properly
- ask for assistance rather than risk an accident. You must ensure that you don't take any action, or fail to take any action, that creates a risk – or increases an existing risk.
- support rehabilitation processes through positive involvement
- provide details on personal medical conditions of which the firm should be aware
- use equipment supplied to complete any required tasks in a safe and proper manner, in accordance with any instructions provided
- take appropriate care and comply with procedures whilst on business travel

The firm is committed to regularly review these procedures to ensure they operate effectively, comply with Occupational Health and Safety legislation and that changes to health and safety issues are reflected. The Group-Manager – Human Resources, in conjunction with each Administration Manager, is responsible for this review.

It will be observed that, in point of detail, this statement is quite different from the one which existed in May 2002. For example, the reference to the appellant "striving" to maintain the

workplace in a condition that is safe and healthy etc has been replaced with a statement that the maintenance of the workplace in a condition that is safe and healthy is “included” within the appellant’s duty to provide and maintain, so far as is practicable, a working environment that is safe and without risk to health. Many of the specific obligations cast by the statement upon the appellant’s team members are similar to those of May 2002, but the appellant’s statement of its own obligations has been considerably recast, and introduced by a short paragraph in which the appellant states that it recognises and accepts its responsibilities, and says that management “will endeavour to” take the steps and implement the measures referred to in that section of the statement. Additionally, a new section within the statement sets out the particular responsibilities of “team leaders and managers” as a discrete group with particular responsibilities.

332 The mid-2003 health and safety statement differed from that of May 2002 in another respect. After the passage which I have set out above, the statement contained an additional section headed “Hazard Management”. It refers to the applicant’s hazard management system, the aim of which is said to be “to eliminate or reduce the risk of injuries and illness associated with work”. It is said to involve “a process of hazard identification, risk assessment, risk control and evaluation of control measures”. The reader is referred to an outline of the hazard management system, the details of which are set out in the main body of WWU. Those details depict schematically a stepwise process for the identification of “all situations or events that could give rise to the potential of injury or illness”. The word “hazard” is defined as “the potential to cause injury or illness”, while the word “risk” is defined as “the likelihood or [sic] injury or illness arising from exposure to any hazards”.

333 Despite these differences between the May 2002 and the mid-2003 versions of WWU, it is significant for present purposes that the latter has retained the statement by the appellant, printed in bold, that it would take every practicable step to provide and maintain a safe and healthy work environment for all people. Nothing in the detailed content of the mid-2003 version of the health and safety statement in WWU rendered this stark proposition any less promissory, or any less contractual, than was the case in May 2002 (and, on the assumptions to which the parties were working, at the time when the respondent entered into the employ of the appellant). It was this statement that the appellant would take every practicable step etc which formed the basis of the trial Judge’s conclusion that the appellant was in breach of

its contractual obligations to the respondent insofar as they related to the matter of health and safety.

334 That brings me to consider the link between the appellant's contractual obligation to take every practicable step etc and the concrete acts and omissions of the appellant which his Honour held to give rise to a breach of that obligation. His Honour's findings about the latter have been summarised in par 250 above. At the core of those findings was his Honour's conclusion that the appellant's handling of the respondent's complaint was "inept". Although contained within a section of his Honour's reasons headed "Findings about the evidence", that conclusion was not, I consider, a finding of fact either directly or by inference – but was rather in the nature of a value judgment about the acts and omissions of the appellant. It is to those acts and omissions that one must turn to discern what it was that, according to his Honour, amounted to a failure to take the steps required by the health and safety statement in WWU.

335 Although probably not tied directly to the appellant's health and safety obligations, it is necessary first to refer to the way his Honour dealt with the respondent's allegation that the appellant had been in breach of a duty which it owed to him in its substantive disposition of his complaint made by his correspondence dated 28 July 2005. As I have noted in par 251 above, his Honour found that the allegations made in that correspondence were (or were "possibly") overstated or were (or "may have been") incorrect. In a later section of his reasons concerned with the question whether the appellant had been in breach of contract, his Honour found that the "conflict of interest" provisions of WWU did not apply to the kind of internal conflict which his Honour held to be inherent in Mr Sutherland's position. In the result, neither because of that conflict nor because of the substantive decision which the appellant made about the respondent's complaints did his Honour find that the appellant breached any contractual norm which was relevant to the cause of action upon which the respondent relied.

336 The appellant submitted in the appeal that this was a case in which its breaches of duty as found by his Honour were entirely procedural. That appears to be so. If one reads that part of his Honour's reasons in which he deals with the appellant's handling of the respondent's complaint, he commences, as I have said, with the view that that handling was

“extremely inept”. At the risk of some little repetition, I paraphrase the findings and conclusions which follow in his Honour’s reasons:

- That, because of the inherent potential for conflict of interest, it should have been obvious to the appellant’s senior officers that it was essential to develop and enforce client-allocation protocol.
- That, in the absence of such a protocol, Mr Evans and Mr Heath should have been particularly sensitive to any complaint, whether justified or not, that Mr Sutherland had abused his power of allocation.
- That Mr Evans and Mr Heath seemingly failed to comprehend, and certainly failed to act upon, the respondent’s complaint.
- That, upon receipt of the respondent’s letter of 28 July 2003 the appellant should have arranged for a senior person to travel immediately to Canberra and conducted a series of one-to-one meetings with staff members – if need be at a room elsewhere in the city.
- That Ms Jowett was not justified in waiting to see if Mr Sutherland would stand down from his position, since that would not have reversed the allegedly unfair allocation decision.
- That, in any event, it was not reasonable for Ms Jowett to delay for 3 months, while Mr Sutherland considered his position.
- That Ms Jowett ought not to have allowed nearly a month to elapse before showing the respondent’s letter to Mr Sutherland.
- That Ms Jowett should have interviewed the other members of the Canberra staff who were named in the respondent’s letter of complaint.
- That Ms Jowett acted inappropriately in treating the meeting with the respondent on 15 October 2003 as a counselling session about his stress rather than responding to his plea for justice.
- That, in her formal response to the respondent, Ms Jowett missed the main point of the respondent’s complaint and failed to deal with his allegations of abuse of power except by the bland statement that Mr Sutherland’s decisions were appropriate having

regard to the needs of the appellant's clients, a matter about which she had made no enquiry.

- That, upon referral of the respondent's complaint further up the line, Mr Evans and Ms Jacobs made no investigation at all, but again set about counselling the respondent.

337 From the foregoing it is evident that the trial Judge made no finding against the appellant as to the merits of the respondent's allocation complaints. His Honour's concern was wholly with the process by which the appellant handled those complaints. Key aspects of his findings against the appellant were those which related to delay, to the lack of an investigation into the merits, and to the appellant's focus upon the respondent's own personal situation (largely the stress from which he was suffering) rather than upon the correctness of Mr Sutherland's actions. These findings are, of course, consistent with the heading to this part of his Honour's reasons – the *handling* of the respondent's complaints – but it remains to consider how his Honour linked them to his later conclusion that the appellant had failed to take every practical step to provide and maintain a safe and healthy work environment for the respondent.

338 His Honour made that link in the section of his reasons where, having held that the obligation to take every practical step etc was contractual, he considered whether that obligation had been breached. His Honour noted that counsel for the respondent had focused their submissions on the conduct of Ms Jowett – see par 265 above. That focus, and his Honour's general acceptance of that approach, shows that the appellant's failure to take every practical step etc was constituted by Ms Jowett's shortcomings in her treatment of the respondent's complaint. It was only in the short extract from counsel's submissions which I have set out at par 265 above – and with which his Honour said he agreed – that his Honour came to the circumstance which was most obviously part of the respondent's "work environment", namely, "the potentially injurious conduct by Mr Sutherland and the effect it was having on [the respondent]". Then followed par 275 of his Honour's reasons, which I have set out at par 266 above.

339 In the appeal, counsel for the appellant submitted that it was wrong for the trial Judge first, to have admonished their client for its handling of the respondent's complaint according

to an unidentified legal standard, and, secondly, to have “jumped” to the conclusion that the appellant had breached its contractual health and safety obligation by the omissions referred to in par 275 – omissions which, in terms at least, did not themselves line up with any particular obligation arising under WWU. Although I would accept that there is some substance in this submission, I consider it something of an oversimplification to say that his Honour merely jumped from the admonishment to the legally significant conclusion. If his Honour was to deal with the submission that the appellant had failed to take every practicable step, he necessarily had to identify what steps might have been taken in the circumstances. That is how I read the identification of the four omissions on the part of the appellant which his Honour identified in that paragraph of his reasons. They were steps which might have been taken, but which were not. In short, those steps were:

1. urgently to investigate and resolve the issues raised by the respondent;
2. to reverse any inappropriate decision that had been made by Mr Sutherland;
3. to take action to effect a reconciliation between the respondent and Mr Sutherland;
4. if appropriate, to terminate Mr Sutherland’s supervision of the respondent’s activities.

340 I have more difficulty with what I consider to be, with respect, his Honour’s omission, when identifying those four steps, to relate them to the requirements of the relevant term in the health and safety statement. Those requirements were twofold: the steps had to have at least a reasonably apparent tendency to provide and maintain a safe working environment, and they had to be practicable. I cannot find, in his Honour’s reasons, any specific testing of the four steps which he held that the appellant should have taken against those contractual requirements.

341 I should say something further about the first of those requirements. A breach of the relevant term in the health and safety statement in WWU is not established, in my view, merely by identifying a step which the appellant did not take and by pointing to the psychological illness which ultimately befell the respondent. It must also be shown that the step, if taken, would have made a difference – would have made, in other words, the respondent’s work environment safer and/or healthier. Further, I think as a matter of construction that it must be a step that, to a conscientious manager or supervisor taking a reasonable view of things, would have a reasonably apparent tendency to achieve that end.

This is the sense in which the words “to provide and maintain” should be understood. The point is not merely one of causation – whether an established contravention of the term caused some loss or damage. Rather, the point is concerned with the prior issue of whether such a contravention had been established.

342 As it happens, I think that his Honour approached the matter in this way, since he introduced the four steps which the appellant should have taken with the words “it ought to have been obvious”. The question, of course, is not whether it ought to have been obvious to Ms Jowett and Mr Heath that sound organisational and personnel management required those steps to be taken: it is, rather, whether it ought to have been obvious to them that, if the steps were not taken, the respondent’s health of safety would be at risk. To answer that question involves two lines of inquiry, first, whether Ms Jowett should be regarded as having been on notice that the events of which the respondent complained had the realistic potential to lead to some illness, disability or infirmity, and secondly, whether his Honour’s four steps ought to have been seen by her as obvious – or even desirable – ones to take to protect the respondent from such outcomes.

343 It is almost by implication that one is able to identify what his Honour regarded as the element in the respondent’s work environment that was unsafe or unhealthy. Despite trenchant criticism of the ineptitude with which the appellant handled the respondent’s complaints, his Honour did not find that it was that factor which gave rise to an unsafe or unhealthy environment. Neither, in my opinion, would any such proposition have been self-evident. Although the word “environment” should doubtless be construed beneficially, I do not think that the mere procedural shortcomings of which his Honour accused the appellant – essentially Ms Jowett – are within the realm to which WWU refers as the “work environment”. However, by agreeing with the summary submission made on behalf of the respondent, his Honour identified the relevant unsafe or unhealthy elements in the respondent’s work environment: the potentially injurious conduct of Mr Sutherland and the effect it was having on the respondent. It would seem that his Honour took the view that, by failing to act in the way he identified in par 275 of his reasons, the appellant had failed to take every practical step to protect the respondent from that conduct.

344 His Honour held that Ms Jowett was aware from the beginning that the respondent

was in an extremely distressed state. By “the beginning” his Honour intended a reference to the time when Ms Jowett received the respondent’s letter dated 28 July 2003. His Honour’s finding was based upon an affirmative answer given by Ms Jowett to the following question asked of her in cross-examination: “Now, you understood from the very first time that you received [the respondent]’s letter of complaint, that he was extremely distressed and anxious, did you not?” His Honour also found that both Ms Jowett and Mr Heath knew (ie after the receipt of that letter) that the respondent found Mr Sutherland’s actions “extremely intimidating and threatening”. This finding was based upon a passage in the respondent’s letter of 28 July 2003 as follows:

During a meeting called for all advisers on 8 July 2003, Rod appeared extremely angry and commenced by confirming the new client distribution lists will be provided today and that if he becomes aware of any adviser having had previous contact with clients without his authorisation “there will be trouble”. This comment was aimed at mark and myself and delivered by Rod turning and looking directly at us. I personally viewed this act as extremely intimidating and threatening.

I cannot find any evidence which would sustain the proposition that, as at the end of July and the beginning of August 2003, the respondent found Mr Sutherland’s actions generally to be extremely intimidating and threatening, but any distinction between such a conclusion and the state of affairs reported by the respondent to Ms Jowett in their second telephone conversation in early August 2003 would be pedantic. In that conversation, the respondent told Ms Jowett that he felt that Mr Sutherland had become aggressive and intimidating, that he was “demonic” and “on fire”, and in no mood to negotiate.

345 The important question was whether these indications given by the respondent to Ms Jowett, serious though they were, ought reasonably to have been interpreted by her as indicative of a work environment that was actually unsafe or unhealthy or potentially so, not merely stressful. In the relevant section of his reasons, his Honour implicitly takes that as a given, but, with respect, I do not believe he was entitled to do so. In a later section of his reasons, dealing with the subject of remoteness of damage, his Honour said:

It must be taken to have been within the contemplation of the parties that, if the obligations were not fulfilled, the particular employee to whom the obligations were owed might become upset, stressed and disturbed. It is notorious that stress and disturbance of mind may lead to a psychological disability. It may be unusual for disturbance of mind to lead to a

psychological condition as severe as that suffered by [the respondent]; there is no evidence on the point.

346 His Honour's findings in these respects were not based upon any medical evidence. Although the medical evidence was to the effect that the respondent's experiences at work had led to his psychological condition, there was no such evidence on the subject of the indications which, in August 2003 and subsequently, ought reasonably to have been regarded as bespeaking the onset of such a condition. In my view, the circumstance that an employee might become, or is, upset or stressed does not self-evidently bespeak the existence of an unsafe or unhealthy work environment. Neither would the circumstance that an employee might become, or be, "disturbed", although I notice that his Honour elevates this condition to one of "disturbance of mind" in the sentence which follows. I would have no difficulty with the general proposition that "disturbance of mind" might lead to psychological disability, but, as I shall seek to demonstrate below, it was not apparent to Ms Jowett, at the relevant time, that the respondent's condition was one of "disturbance of mind". As for stress, I do not consider it to be notorious that stress, without more, ought to be regarded by a conscientious manager or supervisor as necessarily, or even as most likely, a precursor of psychological disability.

347 Ms Jowett, with whose evidence his Honour did not express any credibility concerns in his reasons, was cross-examined in a way which, to my reading of it, rather skirted around the proposition that it ought to have been self-evident to her, in late July and early August 2003, that the respondent was, at least potentially, on the way to a significant psychological illness. At one point, the cross-examination proceeded as follows:

On the last page of [the respondent]'s letter he tells you:

I personally felt a considerable degree of anxiety, stress and discomfort in the office environment, and have been reluctant to accept the decision as final.

Now, you'd agree with me that this was an indication to you that Nr Nikolich was suffering from psychological symptoms as a result of these allegations?--- I would agree that he's suffering anxiety and stress, but psychological symptoms, you know, I don't, - I'm not---

You'd agree that you took away from that that this man, [the respondent], was tell you --- ? ---Yes.

---“All these terrible things have happened, and I’m suffering a considerable degree of anxiety, distress and discomfort.” Do you see that?---Yes.

He makes it explicit for you, doesn’t he?---Yes.

He then goes on to describe Mr Sutherland’s conduct as “malicious and derogatory”. Do you see that?---Yes.

Counsel referred to the enclosure to the respondent’s letter of complaint to which I have referred in par 220 above (the Financial Review item in which it was suggested that bullying by bosses may lead to heart attack or stroke). It was not put to Ms Jowett that she ought reasonably to have interpreted the respondent’s complaint as a warning that he might sustain a heart attack or a stroke as a result of the conduct of Mr Sutherland. Rather, the cross-examination proceeded as follows:

And attachment D is a newspaper cutting about bullying in the workplace?---Yes.

All right. Now, the content of the letter and the attachments would have brought home to you the fact that [the respondent] regarded the complaint as a serious one; would you agree with that?---Yes.

And that he regarded Mr Sutherland as a bully; you agree with that?---Yes. Well, yes.

And he regarded that what was happening to him was causing him stress and anxiety; is that right?---Yes.

Counsel obtained an affirmative answer from Ms Jowett to the question whether, after she had first spoken to the respondent upon receipt of his letter of complaint, she was “concerned about his state of mind”. The matter was taken no further.

348 At an earlier stage, the cross-examination of Ms Jowett proceeded as follows:

And it would be fair to say that between July 2003 when you received his letter of complaint, and January 2004 when you handed it over to Ms Jacobs, you held real concerns for his psychological well-being?---As the discussions developed in the initial stages, when the investigation first came up, when it was first being looked at, I think, you know, we were still exploring that matter, so as things developed, yes.

So do I take it from your evidence that at the beginning, he didn’t seem as distressed, but as time went on, he appeared to be more and more distressed?--
-Yes.

And would you agree with me that in those circumstances, you saw Mr – or saw, observed, or understood [the respondent] to be suffering from increasing symptoms of anxiety and stress; is that correct?---Sorry, could you just repeat that questions?

You would agree with me that over that period of time, you observed him to have increasing symptoms of anxiety and distress?---Yes.

Counsel proceeded to ask Ms Jowett about matters such as risk identification etc, by reference to that section of WWU to which I have referred at par 332 above. Ms Jowett denied counsel's proposition that she took no steps by way of risk identification, risk assessment and risk management. When pressed for details, Ms Jowett referred to her early conversations with the respondent, to her offer of help under the Employee Assistance Program, to a program to which she referred as "Professionalism and Protocols" training which had been undertaken by all staff, and to discussions she had had with Mr Sutherland about his responsibilities. Both the questions and the responses in this part of the cross-examination tended to focus on the procedure followed by Ms Jowett.

349 In the result, the closest the cross-examination of Ms Jowett came to the proposition that, at about the end of July or the beginning of August 2003, it ought to have been obvious or even apparent to her that the respondent was on the road to psychological illness was in the question commencing "now, you'd agree...". Although she was not permitted to answer that question, Ms Jowett said enough to indicate that, while she recognised that the respondent was suffering from anxiety and stress, she did not accept that his then presentation involved psychological symptoms. The closest the cross-examination came to the same proposition with respect to the whole period between July 2003 and January 2004 was in the question commencing "and it would be fair to say ...". Ms Jowett answered that question in the affirmative, but not, as I read it, by reference to the early part of the period. Counsel put it to Ms Jowett that "at the beginning, [the respondent] didn't seem as distressed...", and Ms Jowett agreed.

350 In the period between the phone conversation of early August 2003 and the meeting between the respondent and Ms Jowett on 15 October 2003, there were (according to the respondent's affidavit) about 6 or 8 telephone conversations between the two, in each of which the respondent "insisted that the firm maintain protocol by following the complaints

procedure outlines in Were's Professionalism Protocol and Behavioural Manual." The respondent said to Ms Jowett

I would like you to provide written confirmation of what you are doing to investigate my complaint. You should be complying with the firm's own policy on this. I want to see in writing what is being done.

As noted by his Honour, the respondent said in his affidavit:

I felt angered by the fact that the firm was taking no steps to redress the client re-allocation whilst there was still time to do so. To me, time was of the essence and my conversations with Mr Jowett were frustrating in that the investigation was taking so long and, in the meantime, I was left in the office with Rod Sutherland as my direct superior. I felt that nothing was being done in a timely way to fix up what was, to me, a clear case of injustice.

The respondent added that he recalled telling Ms Jowett of Mr Sutherland's continued "highly aggressive" behaviour towards him. For my own part, I think that Ms Jowett would have been justified in supposing that the respondent was "angry" and determined to assert his rights. While he clearly objected to Mr Sutherland's behaviour, I cannot find any evidence of a suggestion by the respondent to Ms Jowett to the effect, or from which she ought reasonably to have inferred, that he was unwell, or on the road to illness.

351 On 10 October 2003, the respondent wrote a further letter to Ms Jowett on the subject of the business of Mr Barter (to which I have referred in par 226 above). It seems that his was hand-delivered by the respondent to Ms Jowett at their meeting on 15 October 2003. There is nothing in that letter which, at least to a lay mind, bespeaks an imminent psychological illness. However, at the meeting itself, when the respondent said that he had not been feeling well, Ms Jowett encouraged him to see his local doctor, to take sick leave if certificated and to make use of the Employee Assistance Program (see par 227 above). From my review of the evidence, this was the first occasion upon which the respondent said anything from which it would be reasonable to fix Ms Jowett with an appreciation of a risk of illness, and she responded in a way which was, I consider, both sympathetic and appropriate. As I have said, the respondent did not avail himself of the opportunity to obtain counselling under the appellant's Employee Assistance Program. However that may be, my point is that these events show the way that Ms Jowett would react when the prospect of illness or infirmity was apparent. I think it unlikely that, if the respondent had earlier said something

from which Ms Jowett would reasonably have inferred such a prospect, she would not then have done something about it.

352 Unless every instance of anxiety and stress in the workplace should necessarily be regarded as potentially injurious, in the sense of fixing the relevant manager or supervisor with constructive knowledge of the likely onset of psychological illness, I consider that it had not been established that the respondent's circumstances as reported by him in his letter of 28 July 2003, and in his subsequent telephone conversations with Ms Jowett, reasonably put Ms Jowett on notice that he was on course for such an illness. That was the period during which, as the respondent's counsel put it to Ms Jowett in cross-examination, the respondent "didn't seem as distressed". Later, when the respondent's possible illness became apparent to Ms Jowett, she immediately suggested that he take leave and obtain counselling. By then, of course, she and the other managers of the respondent had prevailed upon Mr Sutherland to step down from his position.

353 In what has gone before, I have dwelt upon the timing of Ms Jowett's awareness of the respondent's condition, and how the changing presentation of that condition became apparent to her over the period between the end of July 2003 and their meeting in October. I did so because, as will appear in what follows, much of the criticism which his Honour relevantly made of the appellant related to its failure to act urgently in the circumstances. I shall turn, next, to the core of that criticism, which related to the appellant's omission to take the four steps identified in par 275 of his Honour's reasons, but before doing so I desire to make some brief general observations about the kind of reaction which the appellant may have made to the circumstances reported by the respondent to Ms Jowett in July and August 2003.

354 In the case of risks to workplace health or safety arising from physical causes, generally the appropriateness of a particular "step" to the prevention of those risks or to the protection of employees from apprehended dangers will either be self-evident or at least such as a conscientious manager or supervisor, taking a reasonable view of the matter, should recognise. To take a very simple case, once it became apparent that a workplace was at risk of being flooded as a result of water leaking from a pipe, the obvious step would be to turn off the water supply. In the present case, assuming that it ought reasonably have been

apparent to Ms Jowett that the respondent's health or safety was at risk by reason of his exposure to Mr Sutherland, the obvious ameliorative step for the appellant to take would have been to separate the two men completely. This was not suggested by his Honour in par 275 of his reasons. It may be that, in a small office such as the appellant's in Canberra, complete separation (while both men continued to work) was not practicable. Ms Jowett was asked in cross-examination whether she had suggested either to the respondent or to Mr Sutherland that he take leave with pay, and she said that she had not. Such a proposal was not taken up by his Honour in par 275 of his reasons, again possibly because he would not have been prepared to find that it was practicable. The steps which his Honour identified – and which he criticised the appellant for not taking – were not, I consider, the ones most obviously calculated to deal completely and immediately with the problem of the respondent's exposure to Mr Sutherland. Instead, they involved the conduct of an urgent investigation into the merits of the respondent's complaints. That this should have been regarded by Ms Jowett as naturally calculated to terminate or mitigate the effect of Mr Sutherland's conduct upon the respondent is, I consider, more problematic.

355 That brings me to the first of his Honour's four steps – the proposition that the appellant should have urgently investigated and resolved the issues raised by the respondent. In one of its dimensions, this proposition begs the question. No doubt if the issues raised by the respondent had been resolved as a matter of urgency, that would have been the end of the matter. But, looking at it from the standpoint of the appellant before the event, resolution of issues must be regarded as the objective, not as something which it could then have done unilaterally. I take it that what his Honour intended here was that the appellant should have, as a matter of urgency, investigated the issues raised with a view to resolving them. Given the nature of the complaints made by the respondent about Mr Sutherland's reallocation of client accounts, I would accept that the conduct of an investigation ought to have been obvious to the reasonable managerial mind as a step calculated to lead to a resolution. Indeed, Ms Jowett did conduct an investigation. I take it however, that the burden of his Honour's criticism of Ms Jowett, implicit in the first step with which I am dealing, was that the investigation was not conducted "urgently". It is here that one finds the most powerful of the criticisms which his Honour directed at the procedure employed by the appellant. Essentially, his Honour was saying that, while on notice of very serious allegations made by the respondent, and of the stress and anxiety which they caused him, the appellant – basically

Ms Jowett – did virtually nothing for at least a fortnight, and thereafter proceeded at a much more leisurely pace than the situation required. The “red lights flashing” thesis which his Honour put to Mr Evans (as set out in par 253 above) seems rather obvious in hindsight (as Mr Evans accepted). However, this very thesis demonstrates the potential to blur the substantial issues of which the respondent complained – client reallocation, conflict of interest and the like – with issues relating to the maintenance of a safe and healthy work environment. His Honour’s questions to Mr Evans were, I consider, largely concerned with organisational integrity and personnel management, only at the end touching upon the issue of the respondent’s health.

356 The questions which should be asked are whether Ms Jowett’s failure to conduct her investigation urgently constituted a failure to take a step which, if taken, would have restored the respondent’s work environment to a safer and healthier condition, and whether Ms Jowett ought to be fixed with an awareness that this was so. I do not consider that an affirmative answer to either question was established on the evidence.

357 I have already concluded that Ms Jowett should not be fixed with an appreciation, before 15 October 2003, that the respondent’s health was at risk. Although Ms Jowett was cross-examined extensively as to what her investigation did and did not involve, I do not believe it was put to her squarely that she ought to have realised that her lack of urgency ought reasonably to have been viewed by her as potentially injurious to the respondent’s health or safety. In this area, I believe that a court should approach with caution the making of judgments as to the timing with which a person in the position of Ms Jowett went about a task which was, on any view, a delicate one. I agree that little or no explanation was offered for why Mr Sutherland was not shown the respondent’s letter of complaint until late August 2003, but by then Ms Jowett had had a number of discussions, and put herself in a position, as her notes disclose, to admonish him for his inadequacies in management and decision-making. She had discussed the respondent’s complaint with Mr Evans and Mr Heath. In my respectful view, the conclusion that, in proceeding no more urgently that she did, Ms Jowett was in effect contributing to the respondent’s deteriorating state of health, and should have been aware of that, should not have been reached on the evidence before his Honour.

358 Neither do I think that it had been established that an urgent investigation would in

fact have prevented the illness from which the respondent later became afflicted. The facts of the case disclose that the respondent was so preoccupied with the inherent injustice of what Mr Sutherland had done as to make it nigh impossible, in my view, to assert that the conduct of an urgent investigation as such would have done other than accelerate the course which events subsequently followed. Although it is true that the respondent was experiencing stress and anxiety during the period that Ms Jowett conducted her investigation, if there was a single event which constituted a tipping point, as it were, for the respondent, it appears to have been the phone conversation in November 2003, in which Ms Jowett effectively rejected the respondent's substantive complaints against Mr Sutherland's reallocations, followed soon after by her letter of 8 December (dated 1 December) to like effect. I appreciate that, in the section of his reasons dealing with the matter of causation, his Honour held that the respondent's psychological problems resulted more from the "aftermath" of Mr Sutherland's decision than from the decision itself, but by then his Honour had determined that there had been a breach of the health and safety term in WWU. My point is that, at the stage of considering whether there was such a breach, the conclusion that want of urgency on the part of Ms Jowett of itself – and separate from the substantive outcome of her investigation – resulted in those problems may well have been within the range of reasonable conjecture, but was not, in my view, positively established on the evidence as a matter of fair inference.

359 Turning next to the second step which the trial Judge identified – the reversal of any inappropriate decision that had been made by Mr Sutherland – the first thing that one notes is that the obligation referred to is hypothetical. Only if there was an inappropriate decision would the obligation to reverse arise. The next matter is that it could not be suggested – and I do not read his Honour as suggesting – that the "appropriateness" of the decision referred to was or should be justiciable objectively in later court proceedings such as the present. That question could only be a matter for the applicant itself. Finally, it is apparent that this second step must stand in sequence after the first: it was the investigation, as required under the first step, that would yield a conclusion on the matter of the appropriateness of Mr Sutherland's decision-making. I take it, therefore, that his Honour's second step effectively required the appellant, at the conclusion of its investigation, to determine whether any of Mr Sutherland's decisions had been inappropriate, and, if they had, to reverse those decisions

360 As events transpired, when Ms Jowett's investigation was completed, it was found

that Mr Sutherland's decisions had not been inappropriate. The precondition for the reversal of those decisions, therefore, was not satisfied. This does not, of course, address his Honour's other criticism, that is, that the investigation was not timely. But a consideration of what might have occurred as a result of an investigation conducted urgently must, I consider, proceed from the assumption that the substantive outcome of such an investigation would have been no different from that which in fact occurred in the actual events of the case. Put another way, it is, in my view, impossible to criticise the appellant for failing to reverse decisions considered, as the result of an urgent investigation, to be inappropriate, when the investigation which in fact occurred, albeit that it was not conducted urgently, did not reach any such conclusion.

361 Unlike the first and second steps to which I have referred, it is not apparent whether his Honour intended the third step – taking action to effect a reconciliation between the respondent and Mr Sutherland – to follow sequentially after those that preceded it. I think the better view is that the third step was intended to be free-standing, such that the obligation to take it would arise, for example, whether or not an inappropriate decision had been reversed. The third step differs from the second also in that it is unambiguously concerned with relationships rather than, primarily at least, with the content of Mr Sutherland's decisions. I also read the expression "take action to" as meaning "attempt to", and as involving a recognition by his Honour that it was beyond the appellant's power to effect a reconciliation between two of its staff, one or both of whom might be unwilling or recalcitrant.

362 Subject to those reservations, I would agree that, to the extent that the respondent's stress was caused by the deterioration of his relationship with Mr Sutherland, for the appellant to have attempted to effect a reconciliation between the two men should have been regarded as a step in the direction of mitigating that stress. Where I have a difficulty with his Honour's reasons in presently relevant respects, however, is with the finding that the appellant did not in fact attempt a reconciliation between the respondent and Mr Sutherland. In an earlier paragraph of his reasons, his Honour referred to, but did not set out, the following passage in one of the respondent's affidavits:

Further, during August to October, 2003, Ms. Jowett never put forward a proposal for the resolution of my complaint. However, a conversation took place in words to the following effect:

Jowett: “Rod Sutherland is willing to apologise.”

Nikolich: “I will not accept any form of apology without restitution, that is Rod Sutherland reversing his decision about the client re-allocation.”

It seems, therefore, that the only road to reconciliation would have been a reversal of Mr Sutherland’s reallocation decisions – decisions which the appellant later found not to be inappropriate – and the fact that that road was not taken appears to have been wholly the decision of the respondent. More importantly for present purposes, I can find nothing in his Honour’s reasons which gives credit to the appellant for having brought Mr Sutherland to the point of being prepared to apologise to the respondent, or which amounts to a consideration of the significance of that step to the conclusion that the appellant had not taken action to effect a reconciliation between the two men. In the circumstances, I consider that it was not open to his Honour to find that no such action had been taken.

363 Finally, I turn to the trial Judge’s fourth step – the termination, if appropriate, of the supervision of the respondent by Mr Sutherland. Here again, I take it that his Honour intended that the matter of appropriateness would be for the appellant itself to decide. As with the previous step, the fourth step was in fact taken by the appellant, which thereby recognised at least the potential utility of the step to ease the respondent’s stress and anxiety. When he met with Ms Jowett and Mr Heath on 15 October 2003, the respondent was informed that Mr Sutherland was standing down from the position of manager of the Canberra office. It may be that this step was taken some weeks, or even months, later than his Honour would have regarded as ideal, but the quality of the respondent’s reaction to the removal of Mr Sutherland gives rise, I consider, to the clearest inference that the step would have made little or no difference to the respondent’s personal circumstances whenever it was taken. As with the apology, it seems quite clear that the issue which rankled with the respondent was the injustice of Mr Sutherland’s client reallocations, and that nothing short of a reversal of those reallocations would have given the respondent the peace of mind which his Honour held to be his entitlement under WWU. However, as I have indicated, the result of the appellant’s investigation was that those reallocations were not inappropriate, and his Honour did not find otherwise.

364 In the result, I cannot agree with what is implicit in his Honour’s reasons, namely that

each of his four steps (to the extent that it was not in fact taken by the appellant) did have, or ought reasonably to have been regarded by the appellant as having, a natural tendency to promote or maintain a safer or healthier work environment for the respondent in relevant respects. For the reasons I have given, I consider it probable that the more urgent holding of an investigation would have resulted in the same conclusion as that which Ms Jowett in fact reached in November and December 2003; that, short of reversing decisions which neither the appellant nor his Honour found to be inappropriate, no attempt by the appellant to reconcile the respondent with Mr Sutherland would have succeeded in the face of the former's refusal to accept an apology from the latter; and that, short of reversing those decisions, the termination of Mr Sutherland's supervision of the respondent would likewise have made no difference. Further, I consider that his Honour ought to have found, and to have given credit for the fact, that the appellant did attempt to bring about a reconciliation between the two men and that it did terminate Mr Sutherland's supervision of the respondent – neither of which expedients, because of the respondent's refusal to countenance an outcome that was anything short of what his Honour did not hold the appellant was obliged to deliver, was successful.

365 There is another dimension to the question whether the appellant failed to take every practicable step etc as required by the health and safety statement in WWU. It relates to the scope and operation of that statement in the context of the provisions of WWU as a whole. As is apparent from the context in which the trial Judge expressed his conclusions in par 275 of his reasons, his Honour was there concerned with so much of the respondent's complaint as related to the conduct of Mr Sutherland and the effect it was having on the respondent. That was in essence a complaint of harassment. In the case of such a complaint, there does seem to be a degree of artificiality in devising a series of "steps" which the appellant should have taken pursuant to its general obligations under the health and safety statement, rather than looking to the harassment procedure itself, which contained its own steps specifically designed for the purpose. It is not as though the respondent eschewed reliance on that procedure. Ms Jowett was cross-examined in some detail as to the fit of the actions she took against the harassment procedure in WWU, as though the respondent's position was that Ms Jowett should have regarded herself as dealing with a complaint to be processed under that procedure. Indeed, it was put to Ms Jowett, and she agreed, that the conduct of Mr Sutherland as reported by the respondent would have constituted bullying and harassment

within the meaning of the appellant's policy.

366 Although the general health and safety statement was contractual, the means by which the appellant might comply with its obligations under the statement were not confined to ad hoc responses to unsafe or unhealthy situations as they arose from time to time. To the contrary. There is no reason not to suppose that other provisions of WWU (such as the no-smoking policy) might be the means by which the appellant, to an extent at least, complied with those obligations. On the matter of harassment, the procedure to which I referred is a case in point. I cannot understand why, by doing nothing more than following its own harassment procedure in a situation which involved a complaint of harassment, the appellant should be regarded as not taking every practicable step etc. It would have been both useful and valuable to have known what his Honour made of the interaction between the health and safety statement and the harassment procedure but, as I have said, he did not refer to the latter in his reasons.

367 As is apparent from the terms of the harassment procedure – see par 205 above – urgency played no part therein. Rather, the procedure emphasised such things as communication, understanding, sensitivity and above all else, confidentiality. I do not for a moment suggest that the procedure as such gave any warrant for a dilatory approach, but I do point out, for example (as I have mentioned previously) that it was only after the fourth step in the procedure that any requirement for an investigation arose. I recognise that the present case involved the additional element of the respondent's complaints about Mr Sutherland's relocations, but it was, after all, the respondent himself who said that there was only one situation "intertwined", and who implicitly called up the harassment procedure by insisting that his complaint be treated with confidentiality.

368 In my opinion, when she received the respondent's complaint, Ms Jowett was obliged by the nature of her office and the circumstances of the complaint to treat it as one which invoked the harassment procedure. It is evident by the answers she gave to the respondent's counsel that she regarded herself as doing so. It is not clear whether each step prescribed by the procedure was followed in its appropriate order. However that may be, the harassment procedure seemed to be Ms Jowett's point of reference, as it were. Had she imposed upon herself a primary obligation – primary both in point of timing and in point of importance – of

“investigating and resolving” the respondent’s complaints she would, in my view, have been acting out of harmony with the more measured conciliatory and sensitive processes for which the harassment procedure provided. By not doing so, I do not believe that she, or the appellant, can be regarded as having contravened the health and safety statement.

369 Although I do not rest my conclusion in relevant respects upon this consideration alone, if necessary I would hold that the conduct of some investigation other than that for which the harassment procedure provided should not be regarded as having been “practicable” in the circumstances of the present case. Although the connotation of that word in WWU is not without its difficulties, there is a sense in which “practicable” connotes a state of affairs in which something may be done consistently with some stated or unstated assumptions about other necessary or desirable circumstances remaining undisturbed. It is as though “in the circumstances” always silently follows the word itself. In the context of the present case, the circumstances include the specific procedure which WWU itself provided for dealing with just such a complaint as the respondent made.

370 For the reasons I have given, I take the view that it was not established by the respondent that the appellant failed to take every practicable step to provide and maintain a safe and healthy environment for him. The appellant should not have been found to have breached the respondent’s contract of employment in this respect.

CONCLUSION

371 I consider that the appeal should be allowed, the orders made by the trial Judge should be set aside, and in place thereof it should be ordered that the respondent’s application be dismissed.

COSTS

372 Since it is the opinion of a majority of the court that the appeal, to the extent that it concerns substantive matters, should be dismissed, I shall consider the question of costs on the basis that the respondent rightly succeeded at first instance. One of the orders made by the trial Judge was that the appellant pay the respondent’s costs of the proceeding. His Honour did not advert to s 170CS of the WR Act, which (as it existed at the relevant time) provided that a party to a proceeding under s 170CP not be ordered to pay costs incurred by

any other party to the proceeding unless certain presently irrelevant exceptions applied. Section 170CP(1) was the provision under which the respondent applied for relief in respect of his allegation that the appellant had contravened s 170CK(2)(f). The appellant argued before us that the proceeding as a whole was covered by s 170CS, and that costs could not be ordered in favour of the respondent notwithstanding that he succeeded on a point which arose in the accrued jurisdiction of the court.

373 Section 170CS of the WR Act was the descendant of s 170EHA of the *Industrial Relations Act 1988* (Cth) (“the IR Act”) introduced by the *Industrial Relations and Other Legislation Amendment Act 1995* (Cth). Subsection (1) of s 170EHA provided as follows:

If, in relation to a matter referred to the Court under section 170ED, the Court is satisfied that a party to the proceeding has caused any other party to the proceeding to incur costs because of an unreasonable act or omission of the first-mentioned party in connection with the conduct of the proceeding following the referral, the Court may order the first-mentioned party to pay all or part of the costs incurred by that other party.

The provision referred to as s 170ED was that under which a claim for relief in relation to the termination of the employment of an employee was required to be referred to the court by the Industrial Relations Commission in circumstances where it had not been possible to resolve the claim by conciliation. One type of claim which was covered by this procedure was that the termination had been unlawful because it was done for one or more of the reasons later covered by s 170CK(2)(f) of the WR Act. It will be noted that the primary operation of s 170EHA was to give the court (then the Industrial Relations Court of Australia) a power to award costs. It having been decided by the legislature that the court should have such a power in the circumstances to which the subsection referred, a specific grant of power was necessary because of the then terms of s 347 of the IR Act, subs (1) of which provided as follows:

A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.

In a proceeding to which s 170EHA of the IR Act applied, therefore, there was a general embargo upon an award of costs, as provided by s 347, but there were two exceptions: first, under s 347 itself, where the proceeding was instituted vexatiously or without reasonable

cause; and secondly, under s 170EHA, in relation to unreasonable acts or omissions as therein referred to.

374 Under the regime referred to in the previous paragraph, the primary prohibition upon an award of costs (in a proceeding of the kind which was before the trial Judge in the present matter) depended upon whether the proceeding in question was “a proceeding ... in a matter arising under” the IR Act. There was Full Court authority which dealt with the question whether the prohibition in s 347 applied only to so much of a single proceeding as related to statutory claims under the IR Act itself, or whether the prohibition applied to all claims in the proceeding, including those made in the accrued jurisdiction of the court: *Poulos v Waltons Stores (Interstate) Limited* (1986) 68 ALR 537; *Thompson v Hodder* (1989) 21 FCR 467; *Bostik v Gorgevski* (1992) 36 FCR 439; and *Byrne v Australian Airlines Limited* (1994) 47 FCR 300. On each occasion on which the question arose, it was held that s 347 stood in the way of an award of costs in relation to claims made in the accrued jurisdiction. However, in the penultimate authority to which I referred, *Bostik*, Sheppard J (with the assent of Heerey J) limited his conclusion to that effect to the situation then before the court, namely, one in which the claim in the accrued jurisdiction was based upon an instrument made under federal law, the direct enforcement of which gave rise to the court’s statutory jurisdiction. He took the view that the same conclusion would not, or at least would not necessarily, apply in the case of a claim which, although part of a single “matter” in the *Fencott v Muller* (1983) 152 CLR 570 sense, was legally independent of federal law. In such a case, Sheppard J said that “the court would have jurisdiction to make an order providing for at least part of the ... costs ...” (36 FCR at 444). The other member of the court, Gray J, held that the prohibition in s 347 applied to all claims which were properly before the court in the accrued jurisdiction, on the basis that they came within the same “matter” as that which arose under the court’s statutory jurisdiction, and that the section operated expressly by reference to the “matter”. Of the five members of the court who decided *Byrne*, three (Keely, Beaumont and Heerey JJ) followed *Bostik*, referring both to the judgment of Sheppard J and to that of Gray J, without distinction (47 FCR at 351).

375 None of the authorities to which I have referred directly involved a claim in the accrued jurisdiction which did not rely upon the content of the relevant federal law. *Grout v Gunnedah Shire Council (No 3)* (1995) 59 IR 248 was, however, such a case. That was a

judgment of a single member of the Industrial Relations Court of Australia (Moore J) in a proceeding referred to the court under s 170ED of the IR Act. However, it is apparent from earlier reports of the same case – *Grout v Gunnedah Shire Council* (1994) 57 IR 243 and *Grout v Gunnedah Shire Council (No 2)* (1995) 58 IR 67 – that the whole proceeding was, in effect, played out in the accrued jurisdiction. The questions which arose were, it seems, wholly contractual, the relevant terms of the contract of employment having no basis in federal law. Ultimately, the successful applicant sought his costs, arguing that s 347 of the IR Act did not apply. Moore J recognised the difference between the approach of Sheppard J and the approach of Gray J in *Bostik* to which I have referred (59 IR at 253). If my understanding of the approach of Sheppard J is correct, and assuming that Moore J would regard himself as obliged to follow the Full Court in *Bostik* (notwithstanding that it was a different court), costs should have been available to the successful applicant in *Grout*. However, Moore J held to the contrary. In the course of a detailed consideration, his Honour focused upon the word “proceeding” as it appeared in s 347. He said that the word was a reference to –

... the entire proceedings constituting the trial of a statutory claim or application and any related claim in the associated jurisdiction ...

(59 IR at 260).

He concluded (at 261) that the expression “proceeding in a matter arising under the Act” comprehended “not only the trial of the statutory claim but also the trial of the common law claim brought in the associated jurisdiction.”

376 In 1996, the IR Act was renamed the WR Act by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). That Act also repealed s 170EHA, and introduced s 170CS, which governed the question arising in the present case. Subsection (1) of s 170CS was as follows:

- (1) Subject to this section, a party to a proceeding under section 170CP must not be ordered to pay costs incurred by any other party to the proceeding unless the court hearing the matter is satisfied that the first-mentioned party:
 - (a) instituted the proceeding vexatiously or without reasonable cause; or
 - (b) caused the costs to be incurred by that other party because of an unreasonable act or omission of the first-mentioned party in connection with the conduct of the proceeding.

At the same time, s 347 was amended such that it no longer applied to an application under s 170CP. Section 347(1) then read as follows:

A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.

Relevantly to the present question, the effect of the 1996 amendment was to constitute the new s 170CS as a free-standing provision applicable to proceedings under s 170CP, without the involvement of s 347.

377 What is curious is that, in enacting s 170CS in 1996, the legislature did not repeat the established formula then found in s 347(1): “a proceeding ... in a matter arising under this Act” Rather, the legislature adopted the new wording “a proceeding under s 170CP” The Explanatory Memorandum accompanying the introduction of subs (1) of s 170CS was unhelpful. In part, it merely restated the terms of the subsection. In part also, it read as follows (par 7.86):

The provision for costs resulting from unreasonable acts or omissions goes further than the costs provisions which were previously available to the Court under section 347 of the IR Act.

While literally true, that statement gave the impression that legislative reform had been involved in the enactment of s 170CS. That impression was without foundation: the ability of the court to award costs in the event of a party’s unreasonable acts or omissions was, as pointed out above, part of the previous law, under s 170EHA as introduced in 1995. More relevantly for present purposes, the Explanatory Memorandum said nothing about the minor, but probably significant, change in wording effected by the incorporation into the new s 170CS of the primary prohibition upon the award of costs hitherto found only in s 347. The situation is, it may be thought, made the more curious by the relative currency, apropos the 1996 amendments, of the Full Court judgments in *Bostik* and *Byrne*: those judgments were given in 1992 and 1994 respectively. The legislature appears not to have discerned the significance, as disclosed in those judgments, of the reference to “a matter arising” in s 347.

378 However these considerations may be, there are sound reasons for giving s 170CS the

same construction, relevantly to matters arising in the accrued jurisdiction, as was traditionally given to s 347. No substantive law reform was effected by the repeal of s 170EHA, and the provisions with which it was associated, in 1996. At least relevantly to the kind of claim which was previously covered by s 170DF of the IR Act (termination of employment for reasons of race, colour, sex, etc), the provisions in question were effectively re-enacted (the primary prohibition thereafter to be found in the new s 170CK(2)(f)). If s 170CS was intended to mark out a substantive departure from the previous no-costs regime set up by s 347, it was a departure which went unremarked in the parliamentary materials accompanying the amendment. Save in relation to the wording of the primary prohibition, the new s 170CS was effectively the same as a combination of the repealed s 170EHA and the unchanged s 347, albeit perhaps expressed in terms more in harmony with modern legislative drafting.

379 In my view, the 1996 legislature must be assumed to have been aware of the existence of the accrued jurisdiction of the court, and of the potential, to say the least, for non-statutory causes of action to be litigated in proceedings where the court had a statutory jurisdiction which arose under particular provisions of the WR Act. I do, with respect, agree with Moore J as to the connotation of the word “proceeding” in provisions such as s 347. I think that the legislature must be taken to have had it in contemplation that a single proceeding might have involved claims arising directly under s 170CK(2)(f) (or some other relevant provision) as well as claims in the accrued jurisdiction. That being so, it is a simple matter to read the word in s 170CS “a proceeding under s 170CP” as a reference to a proceeding which had its statutory basis under that section. The section was concerned with proceedings under s 170CP, not merely with claims under that section. A proceeding might well have involved claims in the accrued jurisdiction, and I can think of no reason why s 170CS should not be construed accordingly.

380 For the above reasons, like Moore J in *Grout*, I take the view that the prohibition on costs in s 170CS(1) extended to every part of a proceeding whose statutory basis was s 170CP of the WR Act, including claims in the accrued jurisdiction which, save for being part of a single “matter” in the constitutional sense, were unrelated to rights and obligations arising under federal statutory law. In the present case, the powers of court to award costs to the successful respondent were, in my view, blocked by s 170CS of the WR Act. I would

allow the appeal against the costs orders made the trial Judge.

381 That leaves the question of the costs of the appeal. Here the parties were in furious agreement that s 170CS of the WR Act does not apply, on the basis that the proceeding – ie the appeal – is not “a proceeding under s 170CP”. I think that the court should give effect to that agreement. We were referred to no judgment which has considered the operation of s 170CS in the context of an appeal challenging only so much of the disposition of a proceeding originally brought under s 170CP as involved the exercise of the court’s accrued jurisdiction.

382 If s 170CS does not apply to the appeal, the question arises whether the appeal should be regarded as a proceeding “in a matter arising under this Act (other than an application under s 170CP)” within the meaning of s 347 of the WR Act. If so, the court would be prevented, by that section, from ordering costs. Because of the specific reference to an appeal in s 347, clearly the “proceeding” mentioned therein includes an appeal from a judgment given in a proceeding, notwithstanding that the appeal would otherwise be regarded as a proceeding in its own right. The authorities on which the appellant relied to challenge his Honour’s order for costs at first instance, and which the respondent accepted so far as they went but sought to distinguish, sustain the proposition that the whole of the proceeding before his Honour was “in a matter arising under this Act”. The proceeding before his Honour was an application under s 170CP, with the result that s 347 did not apply. But, was the appeal such an application?

383 In my view, the second parenthetical phrase in s 347 – “other than an application under s 170CP” – is a reference to the provision of “this Act” under which the “matter” arises for the purposes of the section. Not only the whole of the original proceeding, but, because of the specific reference to an appeal, any appeal from a judgment given in that proceeding, should be regarded as being in the matter which so arises. Construed in this way, it is clear that the manifest intention of the parenthetical phrase is to render inapplicable the embargo on costs orders to all proceedings, including appeals, which arise under the WR Act where the source of the court’s statutory jurisdiction is s 170CP of that Act.

384 It follows that there are no statutory impediments to the exercise of the court’s normal jurisdiction to award costs in the appeal. Nothing was put to us which would make it

appropriate to depart from the usual practice whereby costs follow the event. The appellant succeeded only on its argument that the trial Judge had no power to award costs to the respondent. This was a small but important part of the appeal. I consider that the appellant's limited success in this respect would be appropriately acknowledged if we were to order that it pay 90% of the respondent's costs of the appeal.

I certify that the preceding two hundred and seventeen (217) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 7 August 2007

Counsel for the Appellant: J Gleeson SC & A Coleman

Solicitor for the Appellant: Freehills

Counsel for the Respondent: B Hodgkinson SC & K Nomchong

Solicitor for the Respondent: Pamela Coward & Associates

Date of Hearing: 23 November 2006, 15 February 2007, 5 March 2007

Date of Judgment: 7 August 2007