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FULL FEDERAL COURT DECISION HIGHLIGHTS BULLYING/HARASSMENT AND BREACH OF CONTRACT RISKS FOR EMPLOYERS

On 7 August 2007 the Full Court of the Federal Court of Australia handed down its decision in *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2007] FCAFC 120. By a majority of 2:1 the Full Court upheld the decision of Justice Wilcox at first instance to order Goldman Sachs J B Were Services Pty Ltd (**Goldman Sachs**) to pay $515,869 in damages to a former employee, Peter Nikolich.

This decision highlights a number of issues that are important for all employers in Australia.

THE FACTS

Mr Nikolich was employed as an Investment Adviser in the Canberra office of Goldman Sachs. On the commencement of his employment in May 2000, Mr Nikolich was provided with several Goldman Sachs documents including a 119 page document, *Working With Us* (**WWU**). Mr Nikolich signed and returned a copy of his letter of offer of employment, but was not asked to sign a copy of WWU.

In mid-2003, a dispute arose between Mr Nikolich and his manager, Mr Sutherland, about the reallocation of clients after the departure from Goldman Sachs of another investment adviser. In July 2003, Mr Nikolich lodged a formal complaint with the HR section of Goldman Sachs about this decision and what Mr Nikolich regarded as Mr Sutherland's intimidatory behaviour towards him.

The company's Sydney HR Manager took some steps to deal with Mr Nikolich's complaints, but did not handle the matter expeditiously or conduct a thorough investigation. On 1 December 2003, she wrote to Mr Nikolich to advise him that she had found that his complaints were not substantiated. He was absent from work from December 2003 until early December 2004, using a combination of sick leave, annual leave and unpaid leave.

In March 2004, Mr Nikolich informed senior management representatives of Goldman Sachs that he was suffering severe stress and could not face returning to work. Various attempts by these managers to resolve his complaints during 2004 proved unsuccessful. Ultimately, Goldman Sachs advised Mr Nikolich by letter that the company regarded his employment 'as having terminated' with effect from 6 December 2004.

The medical evidence produced at trial generally indicated that Mr Nikolich was suffering from depression. Most of his treating doctors agreed that this was linked to his sense of injustice at the way he had been dealt with at work, but that there was no general psychiatric incapacity to work.

Mr Nikolich commenced Federal Court proceedings alleging that his employment had been unlawfully terminated for purposes of the *Workplace Relations Act 1996*, and breaches of the *Trade Practices Act 1974* and of his contract of employment.

Justice Wilcox dismissed the claims under the Workplace Relations and Trade Practices Acts. However he upheld Mr Nikolich's claim based on breach of contract. He did so on the basis that those portions of WWU that dealt with health and safety, harassment and grievance procedures had been incorporated in Mr Nikolich's contract of employment, that Goldman Sachs had breached those provisions, and that Mr Nikolich had suffered loss in consequence.

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On appeal, Goldman Sachs argued that Justice Wilcox had erred in finding that sections of the WWU document formed part of Mr Nikolich's employment contract; or, if they were terms of the contract, that there was no basis for finding that those terms had been breached; or, if Goldman Sachs had breached any terms, that those breaches did not cause Mr Nikolich's loss.

DECISION

1. Incorporation of HR Manual into Employment Contract

Chief Justice Black noted that the test of whether any terms of WWU formed part of the contract was an objective one, requiring consideration of what the language used would have led a reasonable person in Mr Nikolich's position to believe. His Honour noted that the statements in WWU regarding the provision of a healthy and safe working environment were not explicitly contractual in nature, and could be seen as aspirational. However, the context of the WWU document as a whole was decisive: the health and safety commitments in WWU were a reflection of, and central to, what the document expressed about the Company's culture. If they were found to have imposed no obligation on Goldman Sachs, they 'would be seen as an exercise in hypocrisy'.

In contrast, the Chief Justice found that the language of the statements regarding harassment and grievance processes in WWU was 'plainly not promissory'. The harassment clause was descriptive of Goldman Sachs' aspiration that there not be conduct that made employees feel humiliated, rather than 'a contractual promise that such will not occur'. Similarly, the grievance procedures only described a policy for resolving complaints and were advisory in character. It followed that Justice Wilcox had erred in concluding that the harassment and grievance sections of WWU were incorporated in Mr Nikolich's contract of employment.

Justice Marshall reached the same result as the Chief Justice, albeit by a somewhat different route.

The third member of the Court, Justice Jessup, was inclined to accept that the health and safety term had contractual effect, but dissented on the ground that Mr Nikolich had not established that Goldman Sachs had failed to take every practicable step to provide and maintain a safe and healthy environment for him.

2. Breach of Contract

Goldman Sachs argued that Justice Wilcox's findings that it had breached the health and safety provisions of WWU, through its failure to respond effectively to Mr Nikolich's complaints, ignored the steps that *were* taken in that respect. Both of the majority judges rejected the argument, and determined that Justice Wilcox was correct in concluding that the delay in taking appropriate steps to alleviate Mr Nikolich's very unhealthy work environment constituted a breach of WWU.

3. Causation

The Chief Justice found that it was open to conclude that Mr Nikolich's injury was caused by the breach of the health and safety term in WWU. He did so on the basis of the legal principle that damage may be 'caused' in the relevant sense even though there were other concurrent causes of the breach of contract that did not 'cause' damage in the relevant sense.

4. Remoteness

Goldman Sachs argued that Justice Wilcox should have found that Mr Nikolich's psychiatric injury was too remote to sound in damages; and that to find otherwise was inconsistent with the principle that damages are not available for disappointment or distress in breach of contract cases. Chief Justice Black found that because Mr Nikolich had suffered a psychiatric injury in consequence of Goldman Sachs' breach of contract, cases limiting damages for mere disappointment/distress were not applicable.

In reaching this conclusion, his Honour pointed to English and Australian authority supporting the propositions that damages may be awarded for psychiatric injury caused

by breach of an employment contract; and that damages can be awarded against an employer where its failure to respond appropriately to bullying or harassment in the workplace causes psychiatric injury to an employee. He also dismissed Goldman Sachs' argument that the suffering of psychiatric injury by Mr Nikolich was not a foreseeable consequence of the breach of WWU.

IMPLICATIONS OF *NIKOLICH* FOR EMPLOYERS

- The *Nikolich* case clearly highlights the significant exposures for employers in failing to prevent or address workplace bullying or harassment. These exposures can derive from a number of sources, including:
  - the express terms of the contract of employment, as occurred in *Nikolich* through the incorporation of parts of WWU into Mr Nikolich's contract of employment;
  - implied terms of the contract of employment, such as the emerging duty to behave reasonably/ not to behave in a manner that is inconsistent with the mutual trust and confidence that is said to be inherent in the relationship of employer and employee, or the duty to take reasonable care to prevent the occurrence of work-related injury;
  - the common law duty of care which forms the basis of the tort of negligence and which is largely coterminous with the implied contractual duty of care;
  - although Mr Nikolich's claims under the Workplace Relations and Trade Practices Acts were unsuccessful, in appropriate circumstances failure to address workplace bullying and harassment could form the basis for successful claims for unfair dismissal, unlawful termination and misleading and deceptive conduct under those measures;
  - equal opportunity and anti-discrimination legislation; and
  - occupational health and safety legislation, especially the "general duty" provisions that form part of such legislation in all Australian jurisdictions.
- To minimise these exposures, employers need to adopt policies that are directed to preventing bullying and harassment and that contain effective grievance procedures. They must then ensure that these policies and procedures are implemented in an effective and timely manner through measures such as provision of training, monitoring and supervision of employee (including managerial) behaviour, and prompt response to grievances and complaints.
- The case also serves to highlight the fact that incorporation of workplace policies in contracts of employment can pose real risks for employers. HR manuals and policies often contain terms ranging from the highly prescriptive to the merely aspirational. The decision in *Nikolich* clearly shows that a lack of diligent adherence to these documents on the part of the employer can give rise to liability for breach of contract, and (potentially) substantial damages awards.
- To minimise these exposures, express wording should be used in letters of offer or employment contracts to confirm that, although an employee is required to comply with the employer's policies and procedures as applicable from time to time, these documents do not form part of the contract of employment.

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