1993 per Davies J at pp.8-9) and *Maitland Hospital v Fisher (No. 2)* (1992) 27 NSWLR 721.

Badgery-Parker J found that the defendants had maintained a denial of liability up to the date of hearing (with minor exceptions). He held that they changed their stance on the second day and said that this:

> "...indicates either that the plaintiff's case, as it was revealed on the first day of the hearing, was so overwhelming (and unexpectedly so) that the defendants suddenly decided they had no possible chance of success, or that the defendants had some ulterior motive in delaying the admission of liability until that stage. In all probability, the latter reason would appear the most cogent for the defendants' sudden late admission of liability. There are several reasons for this conclusion:
>
> "1. The defendants had ready access to the material presented at and the conclusions of the coronial inquest.
>
> "2. The defendants have not denied that the admission of liability depended upon the resolution between themselves of their respective contribution of fault and indeed, judging by the first and second defendants' letter of 10 March 1994, were labouring under a misapprehension as to the plaintiff needing to agree to any apportionment arrangement. This is opposed to the clearly established law that a plaintiff is entitled to judgment as against each defendant proved to be a joint tortfeasor.
>
> "Inability to agree between themselves as to contribution does not always justify refusal to admit liability. It may do so where putting the plaintiff to proof is necessary to clarify matters of fact upon which the question of apportionment may depend, but this was not such a case, having regard to the full explanation of the circumstances before the coroner."

His Honour found that the defendants' refusal to admit liability was "unreasonable in the circumstances" and awarded indemnity costs.

Industrial Law - Termination Of Employment

Narelle Nones v.-Armas Nominees Pty Limited t/as Network Rent A Car

Frank Hicks, NSW

Under the changes to the *Industrial Relations Act* 1988 *(C'wealth)* (as amended) which came into force on 28 March 1994, an employee is entitled to remedies in the form of either reinstatement or compensation or both, if the termination of the employment is found to have breached the new provisions of the Act.

A breach of the Act will occur if either:

1. The employer did not have a valid reason for the termination of the employment.

2. The termination was "harsh, unreasonable and unjust".

The above represents a two stage test applied to the circumstances surrounding the termination of an employee's employment. It is for the employer to prove that a valid reason existed for the termination of employment, and it is for the employee to prove that the termination was nonetheless "harsh, unreasonable and unjust".

Should reinstatement be an impractical option in the circumstances, damages may then be awarded. These damages are designed to compensate the employee for the loss of wages that would have been earnt but for the wrongful action of the employer in terminating his/her employment.

The maximum damages available under the Industrial Relations Act are six months wages or earnings and include the total of the package, e.g. if a car allowance was to be provided and was provided as part of the employment package, these monies are also claimable.

The plaintiff in these cases is under the usual obligation to mitigate any loss suffered as a result of the

wrong of the employer, and should alternative employment be obtained, these monies are subtracted from those that would have been earnt but for the unlawful termination.

In a decision of the Industrial Relations Court of Judicial Registrar Millane in the matter of Narelle Jones -v-Armas Nominees Pty Limited t/as Network Rent a Car, The Registrar awarded the applicant an amount of $3,263 The Applicant was earning a gross wage of approximately $263 per week, and under the provisions, that translated to a maximum sum available to her of $6,838

The applicant had been dismissed as at the 25 July 1994, after being employed for two weeks by the respondent. The applicant raised allegations of sexual harassment whilst being employed by the respondent. This harassment was alleged to have come from her immediate supervisor.

The applicant sought counselling in relation to this sexual harassment from a social worker outside the company. The Social Worker was called to give evidence and gave evidence as to the distress, disturbed sleeping patterns, humiliation and vulnerability that the applicant felt due to this sexual harassment.

The termination was found to be invalid and harsh, unreasonable and unjust by the Judicial Registrar. The most interesting point in relation to this case, apart from the review of the meaning of the phrase "sexual harassment" was the awarding of damages. It should be noted that the applicant obtained alternative employment as at the end of August 1994 as a bookkeeper earning approximately $190 per week. Under normal circumstances, this would have meant that her entitlement to damages, given that reinstatement was an impracticable remedy, would be:

1. Loss of wages between the time of her termination and the time of her obtaining alternative employment at the full rate of $263 per week.

2. The difference between her earnings whilst employed by the respondent and her current earnings since obtaining alternative employment for the rest of the six month period as set down by the Industrial *Relations Act.*

3. Any damages for the failure to give requisite notice or wages in lieu of that notice.

Judicial Registrar Millane, rather than follow what was the accepted course, found that whilst the Industrial Relations Act sets out the method of quantification of damages (i.e. a maximum of six months remuneration) "does not attempt to limit the matters which may be considered in awarding compensation".

That is to say that the possibility of general damages has been reintroduced to the Industrial Relations Court by this decision. Whilst the method of calculation refers only to the loss of the remuneration the employee would have received but for the unlawful termination, the provisions of the Act, as expressed, do not limit the award of damages to only those wages lost.

It appears that Registrar found that:

1. The Industrial Relations Act sets out the maximum available damages - six months remuneration.

2. The Act, however, does not limit the award of compensation to wages that would have been earnt.

3. It is available to the Court to therefore take into account other matters, such as stress in the award of compensation, within the parameters set by the Act.

Therefore, the applicant was awarded the amount of $3,263 being calculated thus:

1. $263 - wages in lieu of notice.

2. $789 - three weeks wages by way of compensation for lost remuneration.

3. $2,211 - distress suffered by the applicant.

It is to be noted that the Judicial Registrar awarded the amount of $3,000 be paid pursuant to Section 170EE(3) of the *Industrial Relations Act* 1988 (as amended).

The Registrar stated:

> "I have allowed damages of one weeks wages for the breach of Section 170DB(1) of the Act [that provision recluiring wages in lieu of notice]. I have also allowed a further three weeks wages by way of compensation for lost remuneration under Section

170EE(3); namely $788.

> "Relying on the applicant's evidence and the evidence of Cubitt, the applicant's Counsellor, I accept that the applicant was very distressed by the manner in which she was treated during the course of her employment and by the circumstances surrounding the termination of that employment. The Act, whilst it requires this Court to have regard to the remuneration the Applicant would have received, does not attempt to limit the matters which may be considered in awarding compensation.
>
> "There was passing reference to award provisions applying to this employee and on that basis, the maximum sum available to her would be $6,838 gross for a 6 month period.
>
> "Given the problems between Jenkins and the applicant and the rather short period of her employment, it could hardly be said that she had any real job security with the Respondent. Taking this into account, as well as the loss of remuneration of $789 and the distress suffered by the Applicant arising out of the termination, I have assessed the total compensation payable in the sum of $3,000"

It therefore appears that this case has reintroduced the concept of general damages within the parameters set down by the *Industrial Relations Act* 1988 . Prior to this case, all compensation by way of damages was thought to be in reference only to the loss of remuneration, and the employer being required to put the employee in the same position, had the employment not been terminated, with the usual provisions of mitigating ones loss that arise from contract law.

It now appears that the damages available to an applicant, whilst calculable by reference to the contract of employment and provisions of the Industrial Relations Act 1988 (as amended), may nonetheless be awarded for those matters which are generally the subject of an action in tort.

Workers Compensation - QLD Board Can't Reveiw its Own Decisions

Mark O'Connor, QLD

Members (especially Queensland members) may be interested in a recent decision before the Industrial Magistrate in action of John Patrick Beizlle and the Workers' Compensation Board of Queensland AP 921 of 1994.

The background to the case is that Mr Beizlle received an injury on 18 August 1992 in an assault which he said occurred whilst he was working at a football club.

He made a claim for Workers' Compensation which was accepted. Over the following months the Workers' Compensation Board paid benefits to him.

Subsequently in July 1994 Mr Beizlle received a letter from the Workers' Compensation Board advising him that the Board had effectively changed its mind and were of the opinion that his absence from work was not as a result of "injury" within the terms of Part V of the Workers' Compensation Act 1990. The Board requested a payment back of benefits paid to him and invited him to appeal to an Industrial Magistrate if he did not accept the Board's decision.

The decision was appealed under S.6.6 of the *Workers' Compensation Act*. The hearing took place at the Brisbane Magistrates Court on 7 December 1994.

It was a case for Mr Beizlle that the Workers' Compensation Board under the *Workers' Compensation Act* only had the power to either approve or reject his application for compensation. What the Board was seeking to do in Mr Beizlle's case was to review a previous decision and it was argued that the Board could not do that because the Board had already made its decision and was functus officio.

The Magistrate accepted these submissions, upheld the appeal and awarded costs against the Board.

Apparently, a number of other appeals are pending before the Court where the Workers' Compensation Board has tried to review its decisions. Queensland solicitors should be aware that the Board does not have the power to do this.