

Regulating Dismissals: The Impact of Unfair Dismissal Legislation on the Common Law Contract of Employment

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Introduction

Before the enactment of unfair dismissal laws in the United Kingdom (UK) and Australia, there was little protection of employees from harsh treatment in the termination of their employment. Any remedy of the employee for “wrongful” dismissal was generally limited to damages for the failure to pay notice in breach of contract. By setting up their respective unfair dismissal regimes, the Parliaments in both countries appeared to recognise the importance of work in the lives of employees and the consequential impact of dismissal on an employee’s dignity and well being.

The purpose of this chapter is to build on the finding of Johnstone and Mitchell in *Regulating Law*, that the impact of regulatory law on the contract of employment has generally been “fairly muted”.¹ This chapter focuses on one aspect of regulatory law: unfair dismissal legislation.² It examines the impact of this legislation on the common law rules which govern the termination of the employment contract. This impact may be evident where courts are prepared to engage in “instrumental thinking” in the sense of considering a broader policy agenda which goes beyond the resolution of the individual disputes before them. For example, a court may explicitly refer to the objectives of unfair dismissal laws or to the shifts in community expectations which may have prompted the enactment of those laws or may have developed as a result of those laws. The courts may also refer to certain values, such as the importance of job

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1 Johnstone R and Mitchell R, “Regulating Work” in Parker C, Scott C, Lacey N and Braithwaite J (eds), *Regulating Law* (Oxford, Oxford University Press, 2004), p 120.

2 After this chapter was written, substantial amendments were made to the Australian legislation which deals with unfair dismissal, the *Workplace Relations Act* 1996 (Cth) (WRA). Unless otherwise stated, references to the WRA are to the legislation before its amendment by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth).

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