TERMINATING INJURED EMPLOYEES

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PREAMBLE

In an English comedy sketch from the 1970's involving Peter Cooke and Dudley Moore, a one-legged man seeks to audition for the role of Tarzan. Dudley Moore plays a Mr Spiggott. As he hops into the audition, the producer notices that he is a one-legged man applying for the role of Tarzan, a role traditionally associated with a "*two-legged artiste*". He is told that the role would appear to be one where two legs would appear to be the minimum requirement. The producer says to him:

> "*I've got nothing against your right leg. The trouble is – neither have you."*

He does not get the role as the one-legged Tarzan and he is told by the producer:

> "*In my view the public is not yet ready for the sight of a one-legged Tarzan swinging through the jungle tendrils, shouting "Hello, Jane"."*

The position in New South Wales in relation to injured employees is not as clear as the producer who to fill the role of Tarzan, saw it.

THE COMMON LAW

In contract law a party must be ready, willing and able to perform the contract so as not to be in breach of the contract and so as to be able to enforce the contract.

Chief Justice Sir Samuel Griffith in *Noonan v Victorian Railway Commissioners* said:

> *"Now, it is an implied condition of all contracts that a party demanding performance of the contract shall be ready and willing to perform it on his own part. Readiness and willingness includes ability, and this applies as well to a contract of service as to any other contract: Harmer v Cornelius. When, therefore, a servant is no longer ready and willing to discharge his duties, or becomes permanently incapable of performing them, he relieves his master of any further obligation under the contract. He, in effect, discharges himself.*[1]*"*

Sir Isaac Isaacs, in the same case, said:

> *"The whole position applicable to this case was tersely put by O'Brien J in Grove v Johnson. A servant had become insane, and O'Brien said – 'the real principle I would take to be that mental health, like physical health, is but a form of the ability to perform, which the law makes an understood condition of the contract, and the nature and effect of that disability must vary according to the thing performed. This short statement embodies the principles and reconciles the decisions of all the cases cited.*[2]*"*

Justice Isaacs went on to say, in disposing of the appeal:

> *"It is meaningless to speak of compensation for the loss of an office from which it is either unable or unwilling to derive any benefit."*[3]

Further, in equity, a party seeking to enforce a contract must be able to show that it is ready, willing (and able) to carry out its obligations under the contract.[4]

In an employment sense, a writ seeking to enforce a contract of service against an employer by specific performance or injunction it is incumbent upon the employee to

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1 (1907) 4 CLR 1668 at 1680.
2 (1907) 4 CLR 1668 at 1685-1686.
3 (1907) 4 CLR 1668 at 1686. Further, for the general doctrine in relation to readiness, willingness and ability to perform a contract, see *Breach of Contract* by J W Carter : "Repudiation and anticipatory breach based on an inability to perform."
4 *Australian Hardwoods v Railway Commissioners* (1961) 1 All ER 637 at 642, per Lord Radcliffe; also see *Measures Brothers, Limited v Measures* (1910) 1 Ch. 336; affirmed CA [1910] 2 Ch 248

demonstrate that he is ready and willing (and able) to perform his obligations under the contract.[5]

The strictures of the common law and equity requiring an employee to be able to physically and mentally provide services has been ameliorated by statute in New South Wales in a number of regards. A typical industrial award provides for the payment of sick leave for when a person on account of illness is unable, within the terms of the award and the contract of employment, to provide services. The workers compensation legislation equally provides payment of compensation to an employee for his or her inability to perform work due to injury arising out of or in the course of the employment.

Further, under ss 38 and 38A of the *Workers Compensation Act 1987* additional compensation is paid for a partially incapacitated worker for whom the employer fails to provide suitable duties.

In addition to the foregoing, one is also met with the absolute and stringent duties imposed by the *Occupational Health and Safety Act.* Under the *Occupational Health and Safety Act* the employer has an absolute duty to enforce a safe work place so as to avoid risks of injury both to employees and persons such as contractors who may be on site. Part of this duty is to employ competent staff fit for the job. In *Hudson ats Ridge Manufacturing Company Limited [1957] 2 QB 348 at 350* Streatfield J said:

> "*It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have premises which are similarly reasonably safe. It is their duty to employ reasonably competent fellow workmen. All of those duties exist at common law for the safety of workmen, and, for instance, if it is found that a piece of plant or a part of the premises is not reasonably safe, it is the duty of the employers to cure it, to make it safe and to remove the source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employers to evolve a reasonably safe system of working so as to obviate those dangers, and upon principle it*

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5 *Gordon v State of Victoria* (1981) VR 235 at 239; *Australian National Airlines Commission v Robinson* (1977) VR 87; and *Chapel v Times Newspapers Limited* (1975) 1 WLR 482; (1975) 2 All ER 233

> *seems to me that if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger."*

This principle has been adhered to in Australia. See *Antoniak ats The Commonwealth (1962) 4 FLR 454* and as a principle has recently been supported in the Industrial Relations Commission of New South Wales in *Hanson and Construction Materials Pty Limited ats William Pepper (2008) NSWIRComm 141 at [42].*

However, I am going to focus upon a couple of matters where the common law and equitable principles have been abrogated by statute.

The first of these relates to the *Workers Compensation Act (NSW)* 1987 and the provision within it which pertains to the protection of injured employees, and the other area I will deal with only briefly is the *Anti-Discrimination Act (NSW)* 1977.

PROTECTION OF INJURED EMPLOYEES

Part 8 of the *Workers Compensation Act (NSW)* deals with the protection of injured employees and their reinstatement. These provisions were formerly found within the *Industrial Relations Act (NSW)* 1996 at Part 7. The reason why these provisions were transferred to the *Workers Compensation Act* was to protect the jurisdiction for the reinstatement of injured workers. This was as a result of the Howard Government's Work Choices Legislation which sought and did transfer from the State Commissions unfair dismissal provisions insofar as they applied to corporations. The Work Choices Legislation did not apply to workers compensation so by amendment to the *Industrial Relations Act* and the transfer of the provisions to the *Workers Compensation Act it* was seen to be a means by which such jurisdiction could be retained within the state power of New South Wales. Even though the provision has been transferred to the *Workers Compensation Act* the jurisdiction is not exercised by the Workers Compensation Commission but is still exercised by the Industrial Relations Commission of New South Wales, which formerly exercised it when the Part was found under the *Industrial Relations Act.*

This Part permits an injured worker, being one who has suffered an injury, compensable under the relevant workers compensation legislation[6] to bring an application for reinstatement.[7] The application for reinstatement needs to be brought within two years after the injured employee was dismissed, except in special circumstances when the period may be extended.[8]

In bringing an application for reinstatement, the injured worker must produce to the employer a certificate given by a medical practitioner to the effect that the employee is fit for employment of the kind for which the employee applies for reinstatement.[9] The Commission may order reinstatement for the employment of the kind for which the employee applied, or to any other kind of employment that is no less advantageous to the employee.[10]

An important and far-reaching variation to the contract of employment is found in Section 243(3). That provision of the part permits the Commission to order the employee to be reinstated into another position and can also order a different type of employment such as part-time employment for which the employee may undergo rehabilitation. It is worthwhile setting out the entire subsection. It reads:

> *"**243(3)** If the employer does not have employment of that kind available, the Commission may order the employee to be reinstated to employment of any other kind for which the employee is fit, being:*
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> *(a) employment of a kind that is available but that is less advantageous to the employee, or*
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> *(b) employment of a kind that the Commission considers that the employer can reasonably make available for the employee (including part-time employment or employment in which the employee may undergo rehabilitation)."*

In the circumstances where the Commission orders reinstatement, it may also order the employer to pay the employee an amount that does not exceed the remuneration

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6 Section 240(2)
7 Section 241
8 Section 242(3)
9 Section 241(3)
10 Section 243(2)

that the employee would have, but for being dismissed, received after making the application to employer for reinstatement. [11]

The presumption for dismissal is that the injured employee was dismissed because he or she was not fit for employment as a result of the injury received.[12] That presumption is rebutted if the employer, on whom the onus is to be found, satisfies the Commission that the injury was not a substantial and operative cause of the dismissal of the employee.[13]

Where there are any disputes as to the fitness of the employee seeking reinstatement, that fitness may be referred by the Commission to an approved medical specialist.[14] If an employee is reinstated, the continuity of that employee's service is maintained and is deemed not to have been broken.[15]

An employer has a duty within two years after dismissing an injured employee, to inform the person who has replaced the dismissed injured employee that the dismissed employee may be entitled, under this part, to be reinstated to the work for which the person is employed.[16]

The Act also prohibits the dismissal of an injured employee within six months of the injury having occurred. This is an offence with a maximum penalty of 100 penalty units.[17]

The precursors to Part 8 of the *Workers Compensation Act,* as I have said transferred from the *Industrial Relations Act 1996,* were found in the *Industrial Relations Act 1991* and in the *Industrial Arbitration Act 1940*. The first legislation in relation to protection for injured workers, was introduced in 1987 when significant reforms were legislated for workers compensation within New South Wales. The original provision for protection of injured workers was found in the 1940 Act as Part XV (sections 154-154ZK inclusive). The following comments were made in the course of the Second Reading Speech for the relevant bills:

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11 Section 243(4)
12 Section 244(1)
13 Section 244(2)
14 Section 245
15 Section 246
16 Section 247
17 Section 248

> *"Not only will workers be assured of fair and equitable compensation, but also they will under the legislation be given protection against unfair dismissal while on workers compensation. Nothing is more devastating to a person who has been injured at the workplace than to be dismissed from employment while attempting to recover from injuries. In keeping with the emphasis on rehabilitation, and stressing the responsibilities of all the parties involved, a prohibition will be placed on the dismissal of a totally incapacitated worker within the period of total incapacity, up to a maximum period of six months from the date of injury, unless it is certified medically that the worker is permanently unable to resume duties in his or her former employment. Workers whose employment is terminated outside that period of total incapacity and who are certified fit for their previous work will have a right to apply to the Industrial Commission for reinstatement.*[18]

The various provisions from 1987 onwards have been amended in a number of regards to take into account various decisions that have emanated from the Industrial Relations Commission.

However, when one considers the far-reaching effect that the right to seek reinstatement of an injured worker could have it is strange to relate that very few applications have been brought before the Commission leading to a judgment.

The 1940 and 1991 Acts permitted an employee to apply for reinstatement to his or her "former position" as defined. The current provision, however, permits the injured worker to apply for a position described in the application. That means that the injured worker can, in effect, apply for a different position for which he or she was either employed to do or which the injured worker was occupying as at the date of the injury.

An early case under the 1940 legislation was decided by the Court of Appeal (with special leave to appeal to the High Court refused). It was a case against the State Rail Authority brought by an injured worker who had been placed on light duties for a

18 NSW Hansard, Legislative Assembly, 14 May 1987, page 12211

number of years and was dismissed whilst performing those light duties.[19] The State Rail Authority had dismissed Mr Tyrell on the bases that he was unable to perform his pre-injury work although it was clear he was able to perform the light duties work which he had been performing for many years up until the date of dismissal. In the Court of Appeal, Justice Sheller found that Mr Tyrell was fit for the light duties work from which he was dismissed and, consequently, the order for reinstatement could be made as the position to which he had been transferred was a less advantageous position.[20]

The broader orders which may be made can be that an order for reinstatement is made to employment of a kind that is "available"[21] or to employment of a kind that the Commission considers that the employer can reasonably make available for the employee.[22] As to what the word "available" means, reference can be made to a decision of the Full Bench of the Industrial Relations Commission in *Commonwealth Steel Company Limited v David Alfred Ward.*[23]

The Full Bench found that the word "available" where used in a section was not synonymous with the word "vacant".[24]

The Full Bench said:

> *"We think that the lack of a vacancy in an available position may be a factor which goes to the question of practicability of ordering the re-employment of the applicant, just as the question of the vacancy of the applicant's former position to which he may be reinstated is also a factor which may be taken into account when considering the question of practicability. The weight of that particular factor will, of course, vary from case to case and it may well be, in the situation of an employer with a very small work force or, indeed, one consisting only of an individual employee, that will be greater than the case where the employer has*

19 *State Rail Authority of NSW v The Honourable Justice Bauer* (1994) 55 IR 263 and earlier cases *Tyrell v State Rail Authority of NSW* (1993) 49 IR 236 and (1993) 51 IR 14
20 (1994) 55 IR 263 at 269
21 Section 94(3)(a)
22 Section 94(3)(b)
23 Unreported, decision of Hill and Hungerford JJ, Sheils CC, 16 December 1994, matter No IRC 3144 of 1993
24 At page 16

available numerous such positions. The larger the workforce, the less the relevant significance of the lack of a vacancy in other suitable and available positions."[25]

In considering applications such as this, the Commission needs to consider the medical evidence available for the position to which the application is made. The Full Bench directed its mind to consider the situation where a person sought to be reinstated to a position but where that position may aggravate or cause an exacerbation of the injuries already suffered. In such circumstances, it considered that the employer needed to minimise any future risk to the worker and might do so by monitoring how the employee is working and to transfer that employee to a different position in order to allay concern in relation to aggravation of the employee's injury.[26]

However, it is hardly likely that if all the medical evidence suggests to reinstate the worker to a particular position would more likely than not cause serious aggravation or additional injury, then the prospect of reinstatement would be limited. In this regard, but in a different context, see the decision of Justice Marshall in the then Industrial Relations Court of Australia in *Patterson & Anor v Newcrest Mining.*[27] In dealing with the question of practicability, his Honour said:

"I reject the submission of Mr Melville that it is irrelevant to the question as to whether or not reinstatement is impracticable that there is a risk of serious injury to Mr Patterson upon his return to his former position. In my view, the court would not be approaching the issue of the practicability of reinstatement in a commonsense way if it adopted that approach. I am most reluctant to order the reinstatement of an employee to her or his former position if so doing involved in doing a real and substantial risk of the employee being seriously injured upon her or his return to the position occupied prior to the termination of employment. An order of reinstatement in such circumstances would create unacceptable problems."[28]

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25 At page 17
26 At page 18
27 (1995) 67 IR 101
28 (1995) 67 IR 101 at 104-105

Other cases have been looked at by the Full Bench in order to determine what the word "available" meant within section 94(3). In *Cansino v South Western Sydney Area Health Service,*[29] the Full Bench was dealing with an appeal in relation to an application for reinstatement brought by some registered nurses. The Full Bench found:

> *"We are satisfied on the evidence that there was no available employment of the kind for which the appellant applied having regard to the restrictions contained within Dr Salama's certificate. There was no suggestion that there was any kind of work within the respondent's operations which satisfied the criteria in the application for reinstatement made by the appellant. We are likewise satisfied on the evidence that it would not be reasonable to impose a regime on the respondent to make available the kind of employment for which the appellant applied by way of reinstatement on a continuing basis having regard to the long period of rehabilitation which had been undertaken up to that time. The creation of the kind of employment for which the appellant contended would have severely disrupted the manner in which the respondent relevantly employed its staff and would impose a corresponding and dislocating burden on the Respondent and on the employees who would be affected by such restructuring. It was the respondent's evidence that it deployed its nursing and other staff on a team basis, the jobs were designed so as to provide a range of duties and that it would not be reasonable to interfere with the employment structure."*

Notwithstanding the clear specific provisions in relation to injured workers a number of cases seeking reinstatement of injured workers have nevertheless been brought under the general unfair dismissal powers of the *Industrial Relations Act* as found in Part 6.[30]

Perhaps the rationale for bringing proceedings under an alternative provision of the Act was that it was quicker, or perhaps that it was consistent with the provision in the

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29 [1999] NSWIRComm 355 (23 August 1999)

30 *Effem Foods Pty Limited (Trading as Uncle Bens of Australia) v Urban* (1998) 81 IR 341; *Newcastle City Council v Bevan* (2001) 120 IR 121; *IGA Distribution Pty Limited v Moses (No 2)* (2002) 114 IR 307

Act which says that the Commission must, in the exercise of its functions, take into account the principles contained in the *Anti-Discrimination Act 1977*.[31]

A case which was brought under Part 6 of the Industrial Relations Act unfair dismissals proceedings appeared to have failed because the Commission found under that provision it did not have the power to order reinstatement to a different position. In *Effem Foods v Urban*[32]the Full Bench, in considering section 89(2) found under Part 6, said the section required the existence of an available and suitable position and did not authorise the Commission to require an employer to create a position tailored to the abilities of the applicant. As a consequence, no orders were made in favour of the applicant.[33]

It would appear that had the application been brought under Part 7 as found in the schedule to this paper, then such a consequence would not have developed because of the provisions of section 94(3).

Effem Foods has been doubted as correct in subsequent cases such as *Bevan v Newcastle City Council*[34] and *IGA Distribution Pty Limited v Moses (No 2).*[35]

In the *IGA Distribution* case, the worker was dismissed because medical evidence suggested he was not fit to resume the full range of his previous duties. The worker had previously suffered a workplace injury and had been performing light duties. The unfair dismissal claim was brought on account of this reason.[36]

The Commissioner at first instance had regard to the High Court case of *Qantas Airways v Christie.*[37] The Commissioner said it was incumbent upon an employer to establish after proper investigation and consideration, that a worker's incapacity represented *"an inability to discharge the employment obligations relevant to the*

31 See section 169 of the *Industrial Relations Act*
32 (1998) 81 IR 341
33 (1998) 81 IR 341 at 346
34 (2001) 120 IR 121
35 (2002) 114 IR 307
36 (2002) 114 IR 307 at 308
37 (1998) 193 CLR 280

employee's position before such incapacity could be used to provide proper justification for dismissal".[38]

The Commissioner also relied upon the size of the workforce engaged by the employer to place a greater onus on the employer to ensure that its policies and procedures regarding rehabilitation dismissal arising from assessed incapacity should be the subject of both documentation and ample direct consultation.[39]

The appellant employer argued that the commissioner had erred in ordering the reinstatement of the worker when it was agreed by the parties that the worker could not perform all his pre-injury duties, that being the position that he was originally hired to perform. The Full Bench, however, dismissed that argument on the basis that the Commissioner had ample general powers under section 89 to make an order on such terms and conditions as the Commission decides.[40] The Full Bench considered that the approach set out in the decision of *Commonwealth Steel Company v Ward* is to be preferred to the decision in *Effem*.[41]

The Full Bench found that the lack of a vacancy did not necessarily mean that the position was not available, although it may result in an argument regarding the question of practicability of reinstatement. That particular factor's weight will vary depending upon the size of the workforce.[42] The Full Bench found that the decision in *Effem* which required that there be a pre-existing specified position designated by the employer being vacant was an unduly restrictive approach and adopted the approach found in *Commonwealth Steel.*[43]

The *IGA Distribution* case provides applicant workers with considerable latitude in the types of orders they could seek even under the unfair dismissal regime. In my opinion, the more specific powers provided under Part 8 of the *Workers Compensation Act* provide wider scope for an applicant worker to seek reinstatement to a range of positions for he or she is fit.

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38 (2002) 114 307 at 310 at [10]
39 (2002) 114 IR 307 at 310 at [10]
40 Section 89(8), that is ordering the employer to continue the employment of the worker albeit in the light duties position.
41 (2002) 114 IR 307 at 315 at [26]
42 (2202) 114 IR 307 at 316
43 (2002) 114 IR 307 at 316-317

Banning v Great Lakes Council[44], a decision of Deputy President Harrison, was once again a claim brought as an unfair dismissal matter under Part 6. It was asserted that the employer had breached section 99 of the *Industrial Relations Act* in that it had dismissed the worker after an injury within six months of him first becoming unfit for employment.[45] The Deputy President highlighted the purpose of both the *Industrial Relations Act* and also the *Workers Compensation Act* being that of rehabilitation.

In this regard he referred to a decision of Justice Maidment in *Silaphet & Ors v South Western Sydney Area.*[46] Mr Banning was successful in a claim and his reinstatement was ordered with restoration of wages lost and continuity of services for all purposes including accrual of entitlements. Mr Banning was also awarded his costs. The Deputy President awarded costs on the basis that the Council had unreasonably failed to agree to a settlement of the matter. That might overcome perhaps one of the reasons why matters such as this have not been pursued by injured workers because of the costs restraint. However, it does not explain why more such cases have not been brought by industrial organisations of employees on behalf of their members.

A more recent application of the general provisions of unfair dismissal was brought in New South Wales and was considered by a Full Bench in *Hanson Construction Materials Pty Limited ats William Pepper [2008] NSWIRComm 141* handed down on the 29 July 2008. The *Hanson* case is worth reading in its entirety in order to consider how even a worker who at face value is incapable for doing a lot of jobs may still be reinstated to another position. In this case, Mr Pepper was suffering from a number of conditions which affected his concentration, his balance and his hearing. He had been a truck driver in a quarry and had been subject to a number of accidents. He had a condition called Menieres Disease which was under remission under the use of medication. He was put in another position to which he sought reinstatement. The employer said the new position itself would cause a danger not only to him but also to others in that it required climbing of ladders and walking near dangerous machinery. Detailed medical evidence was called from both sides, however, the employer's doctor failed to take into account all the medical opinion which was in existence concerning Mr Pepper's condition. The doctor had considered the scope of the work

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44 [2002] NSWIRComm 47

45 [2002] NSWIRCOmm 47 at [6]

46 (1998) 80 IR 365. In these cases applications were made, no doubt for abundant caution and without criticism, under both Parts 6 and 7 of the *Industrial Relations Act.*

to be performed, however, the Full Bench found that the balance of medical opinion found that he was fit to do the control room and light manual work. The Full Bench had regard to what was said in an earlier Full Bench decision of *Riley ats WorkCover Authority [2006] NSWIRComm 108; (2006) 151 IR 396 at [93]* they said this:

> "*We consider that in finding the termination of Mr Riley's employment was not harsh, unreasonable or unjust, Ritchie C erred in that he did not give adequate consideration as to whether or not there was another position that the employer had available. In circumstances of cases such as this, when an employee has been dismissed because of a medical restriction that prevents the employee from fulfilling the inherent requirements of the job and therefore reinstatement may be impractical, before a finding be made as to whether or not the dismissal was harsh, unreasonable or unjust, there has to be a full and transparent consideration by the Commission at first instance of whether there was a position available that was suitable for the employee, given his or her medical restriction. If such a suitable position was available a finding that the dismissal was not harsh, unreasonable or unjust may not be open."*

In dismissing the appeal from Commissioner McDonald who reinstated Mr Pepper, the Full Bench in *Hanson Constructions* said:

> "*There was evidence, which appeared to be unchallenged, that the Respondent had worked in and around the control room without incident. When all of these matters, in combination, are considered, it was clearly open to McDonald C to find that the position in the control room was suitable for the Respondent, particularly the entirety of the medical evidence. It was open to the Commissioner not to accept Dr Allen's conclusions, given the other medical opinions in evidence."*[47]

It was said in defence of the company that the company did not have to create a new position to suit the appellant's restrictions [55]. That was dealt with on the basis that it was not made out that the restrictions meant the creation of a new job. In any event,

47 2008 NSWIRComm 141 at [53]

the word "*available*" as used in the legislation was not synonymous with the word "*vacant*" but meant "*capable of being used by, or at the disposal or within the reach of, the employee – whether or not it is vacant at the time."* [56]

Such applications might become more prevalent keeping in mind the reduction in some of the benefits applicable now to injured workers and the restriction in common law claims for negligence arising out of industrial accidents. One might also consider that now that this provision is found within the *Workers Compensation Act* personal injury lawyers may have their attention more focused upon these matters of reinstatement of clients rather than damages.

On the defendant's side, care needs to be taken in relation to settlement of cases so as to avoid a worker who has settled his case either from coming back later when he may have felt that his condition has improved and seeking reinstatement. Rather than merely terms of settlement, one should obtain a full deed of release involving all actions including reinstatement actions. Not to do so might provide an avenue for an employee to seek reinstatement even though a claim has been settled.[48]

My prediction is that more cases under Part 8 will be brought and will successfully obtain orders for reinstatement, back money and, perhaps, costs.[49]

ANTI-DISCRIMINATION ACT

The New South Wales *Anti-Discrimination Act 1977* contains detailed prohibitions against discrimination on a number of grounds including the ground of disability. The word "disability" is interpreted widely by reference to the definition found in section 4 of that Act. Secondly, disability includes past, future and presumed disability.[50]

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48 However, see *Dyet v Lake Macquarie City Council* [2000] NSWIRComm 140 where a claim was defeated on a number of bases including estoppel by conduct. The worker had requested termination in order to enhance his chances of a redemption and commutation of his workers compensation right. That became one of the disentitling factors which defeated his application.

49 Costs in matters before the Commission do not follow the event. See section 181(2) of the *Industrial Relations Act.* Costs are awarded in the applicant's favour when there has been an unreasonable failure to agree to a settlement of the claim. See section 181(2)(c)

50 Section 49A

The Act also provides detailed prescriptions in relation to discrimination in the workplace against applicants for work and employees.[51]

The Act, therefore, operates even before a contract of employment is formed in that it prohibits certain discrimination against a person who suffers from a disability at the point of being offered employment.[52] There is an exemption for persons being offered work in a private household where an employer's number of employees does not exceed five or by a private educational authority.[53]

The Act also has prohibitions against discrimination against commission agents, contract workers, partnerships, local government and councils, industrial organisations, qualifying bodies, and employment agencies.[54] However, the provision in relation to discrimination is avoided if the particular person, because of the disability:

> *"(a) would be unable to carry out the inherent requirements of the particular employment, or*
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> *(b) would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an unjustifiable hardship on the employer."*[55]

The first time the Court of Appeal in New South Wales dealt with the *Anti-Discrimination Act* and the discrimination on the grounds of physical impairment was in *Jamal v The Secretary, Department of Health & Anor*[56]

The then President, Justice Kirby, found that the employer was able to rely upon the defence if it could show that the physically handicapped person, because of the physical impairment, would be unable to carry out the work required to be performed. One needs to have regard to the work required rather than merely the essential nature

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51 Section 49B
52 Section 49D(1). For comparable Federal provisions see the *Disability Discrimination Act (Cth) 1992*
53 Section 49(3)
54 Sections 49E to 49K
55 49D(4)(a) and (b)
56 (1988) 14 NSWLR 252

of the job.[57] Most of the cases involving physical disability turn on services or facilities that *"cannot reasonably be provided or accommodated"*.[58]

In the same case, Justice Samuel provided a general view in relation to the legislation and how it is interpreted. He described it as remedial and was:

> *"designed to provide employment and self respect for those who may have formerly been denied them by a combination of their own physical impairment and the prejudices of employers and social apathy."*[59]

Further, he stated that the Act did not involve motive nor does the discrimination depend upon proof of some deliberate intent to injure the prospects or deny the aspirations of the physically handicapped. What proves the discrimination is that the discrimination must be advertent and done with knowledge of the physical impairment.[60]

Clearly, if an applicant for a position was rejected merely upon the grounds of physical disability without inquiring into his or her ability to perform the work, this would be a breach of the Act. The operation of the *Anti-Discrimination Act* is more important in terms of Applicants for jobs rather than employees who are dismissed because of their physical disability. The latter class is able to enlist the aid of the *Industrial Relations Act* and seek reinstatement pursuant to Part 6 for unfair dismissal. Applicants for positions cannot enlist the aid on the basis that a mere applicant has never been an employee and, as a consequence, cannot enlist the aid of the unfair dismissal jurisdiction.

Current complaints under the *Anti-Discrimination Act* are litigated if they cannot be settled at first instance before the Administrative Decisions Tribunal – Equal Opportunity Division.

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57 (1988) 14 NSWLR 252 at 260
58 (1988) 14 NSWLR 252 at 262
59 (1988) 14 NSWLR 252 at 264
60 (1988) 14 NSWLR 252 AT 265

In dealing with breaches of the *Anti-Discrimination Act* the most common remedy is an award of damages.[61] The powers under the *Anti-Discrimination Act* in relation to damages are capped.[62]

Over the years there has been an integration of domestic, industrial and anti-discrimination laws in relation to employment. This would appear to have been a recent invention. As a consequence, anyone advising in both areas of the law needs to have an understanding each of the other.[63]

All the foregoing identifies that this is a difficult area and it may mean that there is a lot of hope for one-legged Tarzans out there, keeping in mind that the producer ultimately told Mr Spiggott not to give up hope. He said to him:

> "*I mean, if we get no two-legged character actors in here within, say, the next, oh, [checks his wrist watch] eighteen months, there is every chance that you, a unidexter, will be the very type of artiste we shall be attempting to contact with a view to jungle stardom.*"

61 See pages 643 to 644 of *The Law or Employment* Macken, O'Grady, Sappideen, Warburton; 5th Edition, Lawbook Co 2002. In the area of discrimination in the workplace also see *Discrimination Law and Practice* Chris Ronalds, The Federation Press, 1998

62 See section 113 of the *Anti-Discrimination Act* although there are powers to make interim orders to preserve the *status quo* pending the hearing of the finalisation of the matter.

63 *The Law of Employment* cited above, page 604 to 605

SCHEDULE 1