Federal Court of Australia

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University of Wollongong v National Tertiary Education Industry Union [2002] FCA 360 (28 March 2002)

Last Updated: 28 March 2002

FEDERAL COURT OF AUSTRALIA

University of Wollongong v National Tertiary Education Industry Union

[2002] FCA 360

INDUSTRIAL LAW - Termination of employee - Summary dismissal of academic without notification and implementation of investigative procedure provided by relevant enterprise agreement - Whether dismissal contravened enterprise agreement.

Workplace Relations Act 1996 (Cth) ss 170CM, 413A

Workplace Relations Regulations 1996 (Cth) Reg 30CA

Kennelly v Incitec Ltd [1998] 1470 FCA referred to

UNIVERSITY OF WOLLONGONG -v- NATIONAL TERTIARY EDUCATION INDUSTRY UNION and EDWARD J STEELE

N 1273 of 2001

WILCOX, RYAN and CONTI JJ

28 MARCH 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 1273 of 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	UNIVERSITY OF WOLLONGONG
	Appellant
AND:	NATIONAL TERTIARY EDUCATION INDUSTRY UNION
	First Respondent
	EDWARD J STEELE
	Second Respondent
JUDGES:	WILCOX, RYAN and CONTI JJ
DATE OF ORDER:	28 MARCH 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of the respondents.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 1273 of 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: UNIVERSITY OF WOLLONGONG

Appellant

AND: NATIONAL TERTIARY EDUCATION INDUSTRY UNION

First Respondent

EDWARD J STEELE

Second Respondent

JUDGES: WILCOX, RYAN and CONTI JJ
DATE: 28 MARCH 2002
PLACE: SYDNEY

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal by the University of Wollongong ("the University") from a judgment of a single Judge of the Court (Branson J) in relation to the summary dismissal of the second respondent, Edward Steele, from his employment by the University. The first respondent to the appeal is National Tertiary Education Industry Union ("the Union"), an association of employees registered under the *Workplace Relations Act 1996* ("the Act").

The enterprise agreement

2 Dr Steele was employed as an academic at the University from about February 1985 until 26 February 2001. At the date of his dismissal he held the rank of Associate Professor. An enterprise agreement negotiated between the Union and the University applied to him. That agreement is the *University of Wollongong (Academic Staff) Enterprise Agreement, 2000 to 2003* ("the Agreement").

3 The Agreement regulates termination of the relationship of employer and employee between the University and its staff members by stipulating as follows for the giving of notice on one side or the other;

> *"14.1 Notice periods may be provided under sub-clause 14.4 of this clause or Clauses 28 (Probationary Appointments) or 62 (Termination of Employment on the Grounds of Ill Health) of this Agreement or an individual staff member's contract of employment. The required period of notice will be whichever is the greater.*
>
> *14.2* The University must not terminate a staff member's employment unless:
>
> *a.* the staff member has been given the required period of notice; or
>
> *b.* the staff member has been paid the required amount of compensation instead of notice; or
>
> *c.* where the staff member is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the University to continue the employment of the staff member concerned during the required period of notice.
>
> A staff member must not resign from their employment unless the University has been given the required period of notice.
>
> ... ...
>
> *14.4* The required period of notice is as follows:
>
> * Not more than 1 year At least 1 week
>
> * More than 1 year but not more than 3 years At least 2 weeks
>
> * More than 3 years but not more than 5 years At least 3 weeks
>
> * More than 5 years At least 4 weeks
>
> 14.5 The period of notice should be increased by 1 week if the staff member is over 45 years old; and has completed at least 2 years of continuous service with the University."

4 Part 7 of the Agreement is headed "Performance Management". It commences with cl 59, headed "Preamble", which provides;

> *"59.1 Other than as provided for in Clause 28 (Probationary Appointments) and Clause 26 (Incremental Progression) all decisions to discipline or terminate the employment of an academic staff member can only be taken by the Vice-Chancellor in accordance with Parts 6 and 7 of this Agreement.*

59.2 The University must not terminate the employment of an academic unless the academic has been given notice and/or compensation as required under Clause 14 of this Agreement provided that the University may terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice;

59.3 Disciplinary action should be used as a last resort. An academic supervisor must make every effort to resolve instances of possible misconduct or unsatisfactory performance through guidance, counselling and appropriate academic staff development, or appropriate work allocation before a possible report to the Vice Chancellor under Clause 60 of this Agreement.

59.4 In cases involving misconduct, disciplinary action shall be limited to the scope of sub-clause 59.5 b.1. to 3. below.

59.5 Definitions

a. `Termination of Employment' means termination of employment at the initiative of the University.

b. `Disciplinary Action' means action by the University to discipline a member of academic staff for unsatisfactory performance, misconduct or serious misconduct and is limited to:

* Formal censure or counselling;

* Demotion by one or more classification levels or increments;

* Supervision with or without pay;

* Termination of employment;

c. `Serious Misconduct' shall mean:

* Serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of an academic's duties or to an academic's colleagues carrying out their duties.

* Conviction by a court of an offence which constitutes a serious impediment of the kind referred to above.

* Serious dereliction of the duties required of the academic office.

d. `Misconduct' shall mean conduct which is not serious misconduct but which is nonetheless conduct which is unsatisfactory."

5 Clause 60 relates to performance management. There is provision for review of any dissatisfaction with a staff member's performance. This may extend to disciplinary action, even dismissal from the University. Any required notice period is to be paid out in lieu of notice (cl 60.17).

6 Clause 61 is also to be found in Pt 7 of the Agreement. It is headed "Misconduct and Serious Misconduct". It provides, so far as is relevant;

"61.1 Before the Vice-Chancellor takes disciplinary action against a staff member for reasons amounting to misconduct or serious misconduct, the Vice-Chancellor must take the steps in this clause, except that, where a matter which may involve misconduct or serious misconduct has been dealt with in good faith as if it were a case of unsatisfactory performance under Clause 60 of this Agreement, the procedures of this Clause are not required, but the provisions of Clause 60 of this Agreement, including notice periods and review procedures must be followed.

61.2 Any allegation of misconduct/serious misconduct shall be considered by the Vice-Chancellor. If the Vice-Chancellor believes such allegations warrant further investigation the Vice-Chancellor shall:

a. notify the staff member in writing and in sufficient detail to enable the academic to understand the precise nature of the allegations, and to properly consider and respond to them;

b. require the staff member to submit a written response within 10 working days.

61.3 At the time of notifying the staff member in accordance with sub-clause 61.2 the Vice-Chancellor may suspend the staff member on full pay, or may suspend the staff member without pay if the Vice-Chancellor is of the view that the alleged conduct amounts to conduct of a kind envisaged in section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice. Provided that:

a. where suspension without pay occurs at a time when the staff member is on paid leave of absence the staff member shall continue to receive a salary for the period of leave of absence;

b. the staff member may engage in paid employment or draw on any recreation leave or long service leave credits for the duration of the suspension without pay;

c. the Vice-Chancellor may at any time direct that salary be paid on the ground of hardship;

d. where a suspension without pay has been imposed and the matter is subsequently referred to a Committee, the Vice-Chancellor shall ensure that a Committee at its first meeting determine whether suspension without pay should continue and that Committee shall have the power to revoke such a suspension from its date of effect.

61.4 If the allegations are denied by the staff member and the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct he/she shall immediately advise the staff member in writing, and may, by agreement with the academic, publish the advice in an appropriate manner.

61.5 If the allegations are admitted in full by the staff member and the Vice-Chancellor is of the view that the conduct amounts to misconduct or serious misconduct the Vice-Chancellor shall advise the staff member in writing of the Vice-Chancellor's decision and the operative date of the disciplinary action.

61.6 If the allegation is denied in part or in full or if the staff member has not responded to the allegations the Vice-Chancellor shall refer the matter to a Committee in accordance with the provisions of sub-clause 61.9, unless the Vice-Chancellor decides to take no further action or counsel or censure the staff member for unsatisfactory behaviour and take no other action.

61.7 During any period of suspension the staff member may be excluded from the University, provided that he or she shall be permitted reasonable access to the University for the preparation of his or her case and to collect personal property.

61.8 ...

61.9 Where a matter is referred to a Committee pursuant to sub-clause 61.6 the Vice-Chancellor shall convene the Committee within 10 working days where practicable.

... ...

61.10 The terms of reference of the Committee are to report on the facts relating to the alleged misconduct or serious misconduct, including whether any mitigating circumstances are evident.

61.10.1 The Committee shall provide a report to the Vice-Chancellor and the staff member as soon as is practicable following the conclusion of Committee proceedings.

61.10.2 On receipt of the report of the Committee, and having considered its findings on the facts related to the alleged misconduct or serious misconduct, the Vice-Chancellor may take disciplinary action. Where the disciplinary action is to terminate the academic staff member the academic staff member will be provided with notice or payment in lieu of notice as provided for under Clause 14 of this Agreement provided that the University may terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice.

61.10.3 If, having considered the Committee's findings on the facts relating to the alleged misconduct or serious misconduct, the Vice-Chancellor is of the view that there has been no misconduct or serious misconduct he/she shall immediately advise the staff member in writing, and may, by agreement with the staff member, publish the advice in an appropriate manner.

61.10.4 Where a staff member has been suspended without pay pending the decision of the Vice-Chancellor, then any lost income shall be reimbursed if there was no misconduct or serious misconduct. However, a decision taken by the Vice-Chancellor in his or her discretion not to dismiss or impose another penalty shall not be construed as an admission that there was no conduct justifying suspension without pay.

61.10.5 This clause in no way constrains the University from carrying out other or further investigations relating to the consequences of conduct of a staff member or former staff member when required in the public interest, eg inquiring into the truth of research results.

61.10.6 All actions of the Vice-Chancellor under this clause shall be final, except that nothing in this sub-clause shall be construed as excluding the jurisdiction of any external court or tribunal which, for this sub-clause, would be competent to deal with the matter."

7 The relevant provisions of s 170CM of the Act are;

"(1) Subject to subsection (8), an employer must not terminate an employee's employment unless:

(a) the employee has been given the required period of notice (see subsections (2) and (3)); or

(b) the employee has been paid the required amount of compensation instead of notice (see subsections (4) and (5)); or

(c) the employee is guilty of serious misconduct, that is conduct of such a nature that it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice (see subsection (7))."

... ...

(7) Without limiting the generality of the reference to serious misconduct in paragraph (1)(c), the regulations may identify:

(a) particular conduct; or

(b) conduct in particular circumstances;

that falls within that reference.

...."

8 Regulation 30CA of the *Workplace Relations Regulations 1996* (Cth), promulgated in exercise of the power conferred by s 170CM(7) of the Act, provides;

"(1) For paragraph 170CM(1)(c) of the Act , serious misconduct includes:

(a) wilful, or deliberate, behaviour by an employee that is inconsistent with the continuation of the contract of employment; and

(b) conduct that causes imminent, and serious, risk to:

(i) the health, or safety, of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(2) For subregulation (1), conduct that is serious misconduct includes:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault; or

(b) the employee being intoxicated at work; or

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(3) Subregulation (2) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(4) For this regulation, an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duty or with any duty that the employee may be called upon to perform."

The termination of employment

9 On 26 February 2001, Professor G R Sutton, Vice-Chancellor and Principal of the University, wrote to Dr Steele indicating his "grave concern" with Dr Steele's "recent conduct following upon media reports of [his] statement of 9 January 2001 and subsequently". Professor Sutton summarised the relevant course of events and concluded:

"Having reviewed the position at length, I have come to the following views:

(a) that you have engaged in serious misconduct by wilful or deliberate behaviour that is inconsistent with the continuation of your employment and

(b) that your conduct has caused serious risk to the reputation of the University of Wollongong, your employer.

Accordingly, pursuant to Clause 59 of the Enterprise Bargaining Agreement and Section 170CM(1)(c) of the Workplace Relations Act 1996, I advise you that your employment with the University of Wollongong is terminated, effective immediately."

10 The Union and Dr Steele took the view that cl 59 of the Agreement did not authorise the Vice-Chancellor summarily to terminate Dr Steele's employment. They thought the Vice-Chancellor's proper course was to utilise cl 61 of the Agreement. As was agreed before Branson J, the University "did not take any of the actions or follow the procedures provided for in clause 61 of the Agreement".

The proceeding

11 The University did not accept the view of the Union and Dr Steele. Accordingly, on 14 May 2001, they instituted a proceeding, pursuant to ss 178, 179, 179A and 413A of the Act, seeking interpretation of the Agreement. The question raised by that application, as identified by the learned primary Judge, was "whether the University of Wollongong ... is entitled under the Agreement to dismiss a member of its academic staff whom the Vice-Chancellor considers has engaged in serious misconduct of a kind envisaged in par 170CM(1)(c) of the Act without following the procedures provided for by cl 61 of the Agreement."

12 The application was heard by Branson J on 5 July 2001. On 8 August 2001 her Honour ordered that:

> *"Upon the true meaning and intent of clause 61 of the University of Wollongong (Academic Staff) Enterprise Agreement 2000-2003 (`the Agreement'), clause 61 prescribes the steps that are to be taken before the Vice-Chancellor takes disciplinary action against an academic staff member for reasons of unsatisfactory conduct, whether amounting to `misconduct' or `serious misconduct' within the meaning of the Agreement, including for reasons of misconduct of the kind envisaged by par 170CM(1)(c) of the* Workplace Relations Act 1996 *(Cth)."*

13 Branson J gave leave to the parties to apply in relation to other orders.

The judgment of Branson J

14 In her reasons for decision, Branson J held that cl 59.2 of the Agreement is concerned with the notice - in the sense of the period of notice, or compensation in lieu of notice - to be given to an academic staff member before his or her employment is to be terminated; it is not concerned with procedures to be followed before arriving at a decision to terminate the employment of the staff member. The learned Judge said:

> *"This conclusion is, I consider, compelled by the opening words of the subclause, ie:*
>
> *`The University must not terminate the employment of an academic unless the academic has been given notice and/or compensation as required by Clause 14 of this Agreement ....'*
>
> The remaining portion of the subclause qualifies the operation of the broad prohibition contained in the opening words; it does not alter the subclause's subject matter.
>
> The above conclusion is reinforced, in my view, by the use of the phrase "an academic found to have engaged in conduct of a kind ..." in subcl 59.2 [Branson J's emphasis]. The concept of a "finding" as to conduct is, I consider, suggestive of a procedure leading to a determination as to that conduct. Clause 61 of the Agreement provides for such a procedure. On the argument advanced by the respondent, an academic staff member could be "found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the [Act] ..." within the meaning of subclause 59.2 merely because the Vice-Chancellor had formed the view that he or she had engaged in conduct of that kind. Having regard to the procedure required by cl 61 of the Agreement to be followed before "findings" may be made as to conduct which could constitute mere misconduct, as opposed to serious misconduct (see subcl 61.10.2), the interpretation of the above phrase for which the respondent contends seems to me to give inadequate weight to the context in which the phrase is found.
>
> The references made within cl 61 of the Agreement to conduct of the kind envisaged in par 170CM(1)(c) of the Act are also of significance. The first of these references is found in subcl 61.3, which authorises the Vice-Chancellor to suspend a staff member, on full pay or alternatively without pay, if the Vice-Chancellor is of the view that the alleged conduct of the staff member is conduct of the kind envisaged in par 170CM(1)(c) of the Act. The second of these references is found in subcl 6.10.2 which authorises the University to terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in par 170CM(1)(c) of the Act. Each of these references reflects an intention that cl 61 of the Agreement provide a procedure which is capable of being followed in respect of misconduct of the kind envisaged in par 170CM(1)(c) of the Act. It would, in my view, render the Agreement unworkable in a practical sense if the references were required to be read and understood, as the submissions of the respondent would require them to be read and understood, as references to a subclass only of misconduct of the kind envisaged by par 170CM(1)(c) of the Act (ie misconduct of the kind envisaged by par 170CM(1)(c) of the Act which is also "serious misconduct" within the meaning of cl 61 of the Agreement).
>
> It is, in my view, of some significance to note that subcl 61.3 of the Agreement authorises the Vice-Chancellor to suspend a staff member without pay if the Vice-Chancellor is of the view that the alleged conduct of the staff member amounts to conduct of the kind envisaged by par 170CM(1)(c) of the Act, and subcl 61.7 allows a suspended staff member to be effectively excluded from the University. Having regard to these provisions, there would seem to be limited room for the University to be embarrassed by an interpretation of the Agreement which requires compliance with the procedures provided by cl 61 in the case of a staff member believed to have engaged in conduct of the kind envisaged by par 170CM(1)(c) of the Act."

The appeal: preliminary matters

15 On 3 September 2001 the University filed a "Notice of Appeal" against "the whole of the judgment" of Branson J given on 8 August 2001. In response, the Union and Dr Steele filed a notice of contention complaining of the failure of Branson J to have regard to certain extrinsic materials which, they claimed, supported their construction of the Agreement.

16 There are two problems about the document filed by the University. First, considered as a notice of appeal, it was out of time. Order 52 rule 15 of the *Federal Court Rules* requires that a notice of appeal be filed within 21 days of the date when the judgment appealed from was pronounced or leave to appeal given. A later date may be fixed by the Court or a judge. The University's "Notice of Appeal" was filed 26 days after her Honour's orders.

17 Order 15 rule 5 imposes a similar 21 day requirement in regard to applications for leave to appeal. This provision is relevant to

the present case because leave to appeal is clearly necessary. Counsel for the University, Dr G Flick SC and Ms C Ronalds, argued otherwise on the basis that Branson J's order "finally determines the right of the University to terminate employment without compliance with cl 61 of the Enterprise Agreement". However, it was pointed out by counsel for the respondents, Mr J W Shaw QC and Mr P Ginters, that Branson J expressly refrained from dealing with all the issues raised in the proceeding. A final judgment (which does not need leave to appeal) is one that finally determines **all** the rights of the parties that are in issue in the proceeding: see *Computer Edge Pty Ltd v Apple Inc* (1984) 54 ALR 767.

18 We propose to grant leave to appeal *nunc pro tunc* and to extend time for filing the notice of appeal up to and including 3 September 2001. We do so on pragmatic grounds. If we did not take this course, the further hearing before Branson J would proceed without final resolution of the University's challenge to her interpretation of the Agreement. After final orders were made, presumably on the basis of that interpretation, it would be open to the University to appeal as of right, within 21 days of the final orders, and then agitate the correctness of her Honour's interpretation of the Agreement. It seems preferable to determine that question immediately, especially as it has been fully argued, and thereby facilitate resolution of any remaining issues.

Arguments on the merits of the appeal

19 Dr Flick and Ms Ronalds contend that cl 59 of the Agreement imports a power to terminate employment without notice where it would be "unreasonable to require the University to continue employment during a period of notice". That power, they argue, is exercisable without complying with the procedural requirements imposed by cl 61. Counsel say this conclusion is entailed by the natural construction of cl 59. In answer to questions from the Court, Dr Flick said he used the term "without notice" as meaning without any prior notification to the employee; that is, summarily and without warning. Dr Flick pointed out that s 170CM of the Act has been construed as permitting termination without notice or compensation, although the onus of establishing "serious misconduct" justifying such termination remains on the employer: see *Kennelly v Incitec Ltd* [1998] 1470 FCA per Carr J. Dr Flick reminded the Court that the common law has always recognised a right in an employer to dismiss without notice for serious misconduct: see Macken, McCarry & Sappideen, *The Law of Employment* (1997) at 189-192 citing *North v Television Corporation Limited* (1976) 11 ALR 599 at 609. Smithers and Evatt JJ there spoke of "conduct inconsistent with the fulfilment of the express or implied conditions of service".

20 Dr Flick and Ms Ronalds argued that the construction of the Agreement adopted by Branson J was "an exceptional construction". They said:

> *"No matter how exceptional a fact situation may be - involving (for example) unquestioned concerns as to the physical safety of staff or students - such a construction would compel the Appellant University to:-*
>
> - give notice;
>
> - entertain submissions;
>
> - constitute a Committee;
>
> - permit an opportunity for any such committee to conduct "interviews", allowing a staff member to be represented by an "agent"; and
>
> - receive and consider a "report" from a Committee.
>
> Clause 61 is a self-evident attempt to ensure - inter alia - procedural fairness. But even the rules of procedural fairness accept that in some circumstances those rules may be dispensed with."

21 Dr Flick and Ms Ronalds submitted there is no ambiguity in cl 59; consequently, there is no occasion for the Court to have regard to extrinsic evidence, as was suggested to Branson J by counsel for the Union and Dr Steele. They also put submissions about the relationship between the "Serious Misconduct" referred to in cl 59.5 of the Agreement and "conduct of a kind envisaged in (s 170CM(1)(c) of the Act)" referred to in cl 59.2.

22 On behalf of the respondents, Mr Shaw and Mr Ginters supported the reasoning adopted by Branson J. They agreed the Agreement was unambiguous, but asserted the unambiguous meaning favoured their clients. However, they submitted that, if the Court found the Agreement to be ambiguous, the extraneous materials should be considered.

Conclusions

23 In our opinion there is no relevant ambiguity in the Agreement. It is not necessary to go to extrinsic material. The conclusion reached by Branson J is clearly correct. We respectfully agree with her reasoning.

24 The argument put by the University is based on a misunderstanding of the word "notice", in the phrase in cl 59(2) of the Agreement, "the University may terminate without notice". Contrary to the argument of counsel for the University, this does not mean without warning or notification under cl 61. It means without having to comply with the command of cl 14 that the terminating party provide a "period of notice", or payment of compensation in lieu of the employee working out that period of notice.

25 The Agreement makes this meaning clear. The opening words of cl 59.2 are:

> *"The University must not terminate the employment of an academic unless the academic has been given notice and/or compensation* ***as required under Clause 14 of this Agreement*** ". [Emphasis added]

That is the general rule: in the case of an academic, the University may not terminate without providing the notice (calculated in weeks) specified in cl 14 or compensation in lieu.

26 There is a proviso to the general rule: "provided that the University may terminate without notice" - plainly, this is the same notice as is referred to in the statement of the general rule - "the employment of an academic found to have engaged in conduct of a kind envisaged" in s 170CM(1)(c) of the Act "such that it would be unreasonable to require the University **to continue employment during a period of notice**". [Emphasis added] This means that, if the academic has been found to have engaged in conduct so serious that "it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice" - to use the words of s 170CM(1)(c) - the University is not obliged to allow the academic to serve out the period of notice stipulated by cl 14, or to provide compensation in lieu.

27 Clause 59.2 is concerned with the notice obligation imposed under cl 14, and nothing else.

28 This view of cl 59.2 is supported by other considerations. As Branson J observed, the word "found" in the phrase "found to have engaged in conduct", suggests a conclusion reached at the end of an inquiry, such as an inquiry by a committee constituted under cl 61 of the Agreement. Also, it is clear that the drafters of the Agreement did not intend to exclude cases of s 170CM(1)(c) conduct from the reach of cl 61: see cl 61.3 and 61.10.2. The latter reference is particularly important because it sets up two alternative courses of action: to terminate "with notice or payment in lieu of notice as provided for under Clause 14 of this Agreement" or to "terminate without notice the employment of an academic found to have engaged in" s 170CM(1)(c) conduct.

29 The opening words of cl 61.1 are also important. They are couched in mandatory terms, the only exception being a case where the subject matter of complaint has already been dealt with under cl 60. Clause 61 is headed "Misconduct and Serious Misconduct" and cl 61.1 applies to "disciplinary action against a staff member for reasons amounting to misconduct or serious misconduct". Those terms are defined (by cl 59) in such manner as to include s 170CM(1)(c) conduct.

30 As Branson J pointed out, and contrary to the submission put to us by counsel for the University, the application of cl 61 to all cases of alleged misconduct would not cause a situation that was intolerable from the University's point of view. The clause enables the Vice-Chancellor immediately to suspend an employee, with or without pay (cl 61.3), and to exclude the employee from the University (cl 61.7).

31 Another relevant matter is the unlikelihood that the parties would have negotiated a detailed procedure for dealing with allegations of misconduct (cl 61) but agreed to allow the Vice-Chancellor unilaterally to override that procedure in cases where the misconduct reaches s 170CM(1)(c) proportions.

32 It might be thought that, the more serious the alleged misconduct, the more important it is to ensure a right of defence and an impartial investigation of the relevant facts. From the employee's point of view, this will always be the case. It may also be the case from the employer's point of view. A disputed allegation of serious misconduct may open up issues of administration that it is in the public interest for the University to investigate and resolve.

33 Counsel for the University argued the appeal on the basis that dismissal without notification of impending action and provision of a hearing is the norm, rather than the exception. As mentioned, they referred to the common law right of an employer to dismiss without notice for serious misconduct and cited Macken, McCarry and Sappideen. However, this reference involves the same misconception as the University's principal submission. As the reference to *North* makes clear, the learned authors were there speaking of the giving of a period of notice, or compensation in lieu. They were not dealing with giving notification of impending action and a hearing.

34 Whatever might have been the position in bygone days, most contemporary employees enjoy a right to be notified of any allegation of misconduct, and an opportunity to answer the allegation, before disciplinary action is taken against them. This situation reflects the principle embodied in Article 7 of the *Convention Concerning Termination of Employment at the Initiative of the Employer* adopted by the International Labour Organisation in 1982 and subsequently ratified by Australia. That Article reads:

> *"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."*

35 The international principle has influenced the content of numerous Australian statutes, industrial awards and enterprise agreements. It is unlikely any trade union, today, would accept a proposed enterprise agreement that permitted the employer to dismiss an employee for misconduct without prior warning and an opportunity to make a defence. Common fairness requires the provision of these rights. It is disappointing to find a university, of all employers, claiming not to be under an obligation of common fairness.

36 The appeal should be dismissed with costs.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 28 March 2002

Counsel for the Applicant:	Dr G Flick SC with Ms C Ronalds
Solicitor for the Applicant:	Hansons
Counsel for the Respondent:	Mr J Shaw QC with Mr P Ginters
Solicitor for the Respondent:	Maurice Blackburn Cashman
Date of Hearing:	27 February 2002