

# Unfairness in Employment Relations – The Answer may be Estoppel

Katie Wright, Truman Hoyle Lawyers

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With the increasingly limited access to the unfair and unlawful termination provisions of the Federal industrial relations legislation, more frequently disputes are making their way to the courts by virtue of causes of action for breach of common law contract. As a consequence, contractual interpretation is gaining attention and the rights and obligations of parties to an employment relationship are being derived from a variety of sources, including letters of offer, workplace policies and procedures, and industry practices.

However, contractual interpretation is not without limitation. In particular, the express written terms of a contract of employment will be given preference to any oral agreement or custom of the parties to the contrary. Such preference is assisted in part by the inclusion of ‘entire agreement’ clauses which put each party on notice that no other terms, outside those contained in the contract, apply to the employment relationship.

Accordingly, in some situations, a valuable alternative to a breach of contract claim is a claim in equity and, in particular, an action in estoppel.

## 1. **Equitable (Promissory) Estoppel**

1.1 Equitable, or promissory, estoppel developed in order to remedy wrongs arising out of one party’s dependence on promises made by another. The remedy to an action based on promissory estoppel is that the promisor is precluded from going back on his or her promise even where the promise is not supported by valuable consideration.

1.2 To establish a case of equitable estoppel, the complainant needs to show that:

- (a) The complainant assumed a legal relationship existed between the complainant and the promisor that could not be withdrawn from (*Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387);
- (b) The promisor induced the complainant to adopt that assumption or expectation (*Ibid*);
- (c) The complainant acted or abstained from acting in reliance on the assumption or expectation and the promisor knew or intended for the complainant to do so (*Ibid*);
- (d) The complainant’s action or inaction occasioned detriment in the absence of the assumption or expectation being fulfilled by the promisor (*Ibid*);
- (e) The promisor failed to act to avoid the detriment (*Ibid*).

1.3 Note that some case law suggests that the promisor must have negligently given rise to the assumption on the part of the complainant (*Grundt and Others v The Great Boulder Proprietary Gold Mines Limited* (1938) 59 CLR 620).

## 2. **Equitable Estoppel in the Employment Context**

2.1 The practical use of a possible action in equitable estoppel will normally become apparent at the end of the employment relationship when determining the terms of employment (and of termination) and the entitlements the departing employee should receive.

2.2 In practice, ‘considerable injustice’ may arise by virtue of restricting the obligations of the employer (and the entitlements of the employee) to what is contained in the written

employment contract.<sup>1</sup> The employment contract, notwithstanding the intention that it will contain all the terms of employment, may not, realistically, reflect agreements and/or understandings reached between the parties during the tenure of the employee's employment.

- 2.3 As Joellen Riley states in her article '*Estoppel in the Employment Context: A Solution to Standard Form Unfairness*'<sup>2</sup>, "it can be difficult to capture within the terms of a document the expectations of parties to an evolving, co-operative relationship".
- 2.4 In particular, difficulties may arise in the greenness of interviewing employees who accept a standard form employment contract without thoroughly considering and/or negotiating its terms. As the relationship evolves and the employee's seniority and expectations of the entitlements of their position develops, the initial written contract likely no longer reflects appropriate terms of employment or the promises made by the employer in the course of the employee's employment.
- 2.5 At the end of the relationship, legal rules which give preference to the written contract over the parties real expectations of the relationship create a risk that one or the other party to the relationship may 'opportunistically rely on the fiction of the document to secure an advantage which is not supported by the mutual expectations of the parties while the relationship survived.'<sup>3</sup>

### 3. **Relying on Implied Terms**

- 3.1 In such situations parties have commonly commenced breach of contract claims and the court has had to rely on the principles of contractual interpretation to resolve the dispute. As foreshadowed earlier, the principal difficulty in relying solely on contractual interpretation, and the existence of implied terms, is that a term will not be implied into a contract if it is inconsistent with an express term of the contract (*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20).
- 3.2 Again, the common inclusion of the 'entire agreement' clause creates further difficulties, as the court will not then query whether there were any other oral terms of the agreement between the parties that may constitute a term of employment.

### 4. **Remedies by Virtue of Equitable Estoppel**

- 4.1 A successful action in equitable estoppel will prevent a person who has made a particular representation or caused an individual to develop an expectation, from revoking or retracting the benefit of that representation or expectation. If successful, an action in equitable estoppel will result in the parties rights and entitlements being determined in accordance with the given representation or expectation. So, for example, equitable estoppel may be relied on to ensure the payment of an agreed rate of commission (contrary to a contractual undertaking to the contrary) or to secure an agreed tenure of employment.

### 5. **Estoppel by Convention**

- 5.1 Joellen Riley suggests that the preferred (and generally most appropriate) cause of action in equity in the employment context is estoppel by convention. Note that though in many

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<sup>1</sup> Riley, Joellen, 'Estoppel in the Employment Context: A Solution to Standard Form Unfairness?' [2007] UNSWLRS 49.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

situations this may be the most applicable course, estoppel by convention should be considered an alternative to, and not an option to the exclusion of, promissory estoppel.

- 5.2 Estoppel by convention requires that the parties have mutually assumed a particular basis for their relationship, regardless of the actual terms of any written contract or deed (*Grundt and Others v The Great Boulder Proprietary Gold Mines Limited*<sup>4</sup>). More recently, estoppel by convention has been described as a form of estoppel founded on the conduct of relations between the parties on the basis of an agreed or assumed state of facts.

## 6. Estoppel by Convention in the Employment Context

- 6.1 Riley queries what type of written contracts might be overlooked in favour of establishing terms and conditions of employment by estoppel by convention. Referring to Jessica Rowe's dispute with Channel Ten (which essentially questioned whether a 26 week notice period could apply in excess of an apparent fixed term contractual period), Riley posits that one particularly helpful application of the cause of action is in fixed term contract disputes arising where the employee's service is more realistically described as being on a continuing basis. In these types of cases, estoppel by convention may be relied on to prevent an employer from terminating the employment of an employee (or, at least, terminating without notice) by virtue of the expiration of the fixed term (the same applies in respect of an employee's resignation). The cause of action is particularly pertinent in circumstances where no express representations have been made by either party about continuity of employment.

- 6.2 Estoppel by convention might also be useful in circumstances where an individual is given an annual bonus or commission structure which is not renewed in subsequent years (*Bredel v Moore Business Systems Ltd* (2004) 18 Commercial Law Quarterly 3-11). If a dispute later arises as to whether or not the bonus or commission is payable at the same rate in subsequent years, the employee may rely on estoppel by convention, asserting that, had the employer intended to vary those terms, a new written arrangement would have been presented for perusal and acceptance, and/or that there existed an informal agreement between them to continue the existing bonus/commission arrangement, provable by their course of dealing with each other.

## 7. Estoppel by Representation

- 7.1 Estoppel by representation is used in circumstances where there is a promise or a sufficiently clear and unambiguous representation made to the complainant by the promisor, which the complainant relies on to their detriment (*Australian Crime Commission v Gray* [2003] NSWCA 318 at [200]; *Legione v Hately* (1983) 152 CLR; *Galaxidis v Glaxidis* [2004] NSWCA 111). In such cases, the complainant may rely on an action in estoppel by representation as both 'a sword and a shield', preventing the promisor from reverting from its promised position and providing a defence against any action or benefit that may arise in favour of the promisor in the absence of the representation having been made.

- 7.2 Riley suggests that this brand of estoppel might be of use in cases where written contracts contain very short notice periods, notwithstanding oral commitments by an employer that a job is a secure, long term position. This is a particularly more convenient course of action than a Trade Practices claim which is legally complex to establish and expensive to run. Riley refers to *O'Neill v Medical Benefits Fund of Australia Ltd* [2002] FCAFC 188 where

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<sup>4</sup> (1938) 59 CLR 620

the result of the successful trade practices claim required a calculation of the remuneration O'Neill would have received had he not changed jobs. In contrast, if the matter had been pursued as an action in estoppel by representation, the result would have been that the parties were taken to be bound by the arrangements evidenced by their representations or course of dealing.

- 7.3 In this sense, Riley explains that estoppel is effectively expectations based rather than reliance based. In Mr O'Neill's case his entitlement to the fulfilment of the expectation of a lengthy tenure would require the employer to pay a reasonable (and significant) period of notice for a position that was promised to be long term (ie. a much simpler calculation of quantum).

## 8. Concluding Comments: When to Use Estoppel in the Employment Context

- 8.1 A cause of action in estoppel has a variety of applications in the employment context. As noted, it may be relied on to:

- (a) Rebut a presumption of the termination of a contract of employment after the expiration of fixed term;
- (b) Claim an extended period of notice where a termination is made prematurely (notwithstanding representations of secure tenure); or
- (c) Claim expenses, bonuses, commissions and leave entitlements on the basis of representations, orally agreed terms, or custom or practice.

- 8.2 While there is currently very little Australian case precedent to support the use of estoppel in the employment context, causes of action in estoppel may be of good use where there are limitations imposed by Federal industrial relations legislation upon commencing AIRC proceedings and where the employee is employed pursuant to a contract (or other instrument) which provides express terms of employment which are contrary to the conduct or representations made by the parties during the employee's appointment. In those circumstances, estoppel should be borne in mind as a viable legal course of action.

Katie Wright  
 Lawyer  
 Truman Hoyle Lawyers  
[kwright@trumanhoyle.com.au](mailto:kwright@trumanhoyle.com.au)  
 Tel: (02) 9226 9888  
 Fax: (02) 9226 9899

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