[INDUSTRIAL RELATIONS COURT OF AUSTRALIA]

BECHARA v GREGORY HARRISON HEALEY & CO

Madgwick J

19 April 1996

Termination of Employment — Unlawful termination — Application for review — No valid reason for termination — Duty on employee to mitigate loss — Reinstatement practicable — Reinstatement offered and refused — Compensation refused — Industrial Relations Act 1988 (Cth), s 170EA.

MADGWICK J. These are my reasons for the decision I announced on 5 March 1996.

Introduction

The judicial registrar made the following orders:

''1. The application for compensation for unlawful termination is dismissed.
2. The respondent is ordered to pay to the applicant the sum of $7,484 being outstanding holiday pay within 28 days of the date of this decision.
3. The respondent is to reimburse the applicant the sums of money wrongfully deducted as superannuation such amount to be determined by the Law Society Superannuation Fund at the request of the applicant and is to be reimbursed to the applicant by the respondent within 14 days after the respondent receives verification of the determined amount from the applicant.
4. The applicant is to pay to the Law Society the sum of $300.00 within 14 days of the date hereof.''

On this application for review, the applicant ex-employee conceded that Order 3 was made without jurisdiction, and did not pursue Order 4.

In respect of Order 3 an alternative order was sought. It was explained that the *Superannuation Guarantee (Administration) Act* 1992 (Cth) required that an employer pay the three per cent superannuation levy otherwise than by deduction from the remuneration ordinarily payable by that employer to the employee, and that those provisions had been contravened here. In the end, it was agreed that arithmetically the sum of $1,189.50 was a correct computation of the amount claimed.

I will order the payment of that amount. It appears to me that the submissions in support of it are well-based. It is implicit in that finding that the applicant was an employee of the respondent. The contrary was not contended on the review, and this concession on behalf of the respondent was clearly correctly made.

A subsidiary issue was the amount that ought to be ordered on account of unpaid annual leave which was the subject of the judicial registrar's Order 2. It was submitted for the respondent employer that the applicant's remuneration at

the time of the termination of her employment was $650.00 per week gross. I am quite clear however that the agreement reached, which in the end the respondent said he would honour, was for $650.00 per week after tax to be paid to her, with him to pay the tax in addition, as would ordinarily be the case.

The principal issues were whether the applicant employee resigned or had her employment terminated by the respondent and whether any termination by the employer was unlawful.

The legal entrepreneur and his apprentice

The respondent appears to have been more gifted entrepreneurially, in the sense of acquiring solicitors' practices, hiring staff and profiting from them, than by way of a capacity for close attention to the law in organising his own affairs and those of his employees. He had been through a divorce which had left him financially strained. He was being pressed at relevant times by a bank or banks. He had nearly a dozen separate offices scattered throughout Sydney to supervise. All of this would have imposed a daunting workload upon him.

The respondent had no complaints about the work of the applicant. Indeed, he wished to have the applicant, as he wished to have some others of his more responsible employees, enter into partnership with him. He had engaged her, in effect, straight out of law school, given her some training and had shortly put her in charge of his Ashfield office. She spoke Arabic and understood Middle Eastern cultures. There was a large Lebanese clientele at Ashfield and she was both diligent and capable in representing his clients and in collecting costs. Mr Healey wanted her to buy a partnership share. If she would do this, in a not insignificant sum, then he could contribute the price which he would thus receive to his bank or banks and reduce their pressure upon him, as well as reduce outgoings for interest to them.

The applicant had commenced working for the respondent in May 1992 on a salary of $30,000 per annum gross. She soon came to the conclusion that she was worth a good deal more than this to the respondent, in view of both the amounts that she had billed and in relation to the number of ''billable hours'' of work that she was contributing. In about September 1993, she raised this matter with the respondent, who said he would do something about it. He thereafter arranged that she receive $650.00 per week, less only the unlawfully deducted amount of the three per cent superannuation levy each week. The method of payment was to deposit these sums into her bank account.

It seems that the respondent then raised for the first time the question of a partnership with the applicant. He told her that he would like her to become a partner and that he thought that an appropriate price for whatever share of the practice he had in mind would be $110,000.00. He indicated that, until that matter was sorted out, she would become a ''consultant'' and that, in the event that a partnership was consummated, he would treat the $650.00 per week as a drawing against her partnership account. In the event that the partnership arrangements which he desired were not fulfilled, he said he would pay her tax. He appears to have had somewhat muddled and unrealistic beliefs as to how he might, in various ways, save himself money by designating the applicant as a consultant and treating her as if she were an independent contractor.

In about July or August 1994, the applicant received a group certificate prepared by the respondent's accounts staff which represented that she had been an employee for only the first couple of months of the financial year

1993/94. She soon became aware that the respondent, in treating her as a consultant, had decided to treat her as an independent contractor but was willing enough, in effect, to give her an indemnity against the net tax for which she would be liable, after all available deductions. Unbeknown to the respondent, the matter of Ms Bechara's truly taxable income and the importance of her truthful compliance with income tax legislation was very much on her mind because a tax accountant, whom she had in good faith employed, had caused all of his clients, including the applicant, to be audited by the Tax Department. She, therefore, began to ask the respondent for a group certificate, upon the assumption that the respondent would somehow pay, albeit late, the PAYE tax deductions which he should have paid. The respondent's response was to the effect that he would see that the matter was resolved to her satisfaction. He suggested that he speak to her accountant and, then, that the two accountants speak to each other. Time went by. Mr Healey evidently found more pressing things to occupy his attention than close diligence to the matter of the applicant's tax position. She raised the matter again. The respondent told her that he would attend to the matter in his own good time and that, if she persisted in vexing him about the matter, he would consider terminating her employment.

The parting of the ways

Eventually the applicant became very concerned about this matter and, on 10 November 1994, sought an appointment with him for 11 November, which, at some inconvenience to himself, because of her insistence, he arranged to keep. She then told him that she was very concerned about it, that she needed a correct group certificate and that, if it were not forthcoming, she would lodge her own tax return with a statutory declaration outlining what had happened and pointing out to the taxation authorities that her tax had not been deducted, as it should have been, by the respondent. Ms Bechara knew, of course, that this would cause Mr Healey considerable trouble.

Ms Bechara's account of the conversation, as it appears in her affidavit, is as follows:

> ''On 11 November 1994 at approximately 12 noon I attended the city office of the firm and later met the Respondent. At his suggestion, for privacy reasons we went upstairs to a vacant floor. A conversation (in words to the following effect) ensued:
>
> Myself:
>
> 'I do not appreciate your threat in regard to termination. I need to put in a tax return and I want to have a Group Certificate which properly reflects my employment and income. The present Group Certificate ends after 2 months and would require me to pay tax for the remaining 9 or 10 months of last financial year as well as provisional tax. You said that the firm would pay my tax and, of course, it is obliged to as I am an employee. On the basis of the present Certificate no tax has been paid by you after 10 September 1993.'
>
> Respondent:
>
> 'You know you became a Consultant to the firm as from 10 September 1993 and you are therefore responsible for your own tax thereafter.'
>
> Myself:
>
> 'You said to me to bring in the costs and you would pay my tax. At any

rate I want a proper Group Certificate by next Wednesday. I am already overdue to lodge my tax return.'

The Respondent then said:

'Your employment is terminated.'

I then said:

'Are you going to give me notice of termination?'

The Respondent replied:

'You are terminated.'

I then got up and commenced to leave.

The Respondent then said:

'You fucking bitch.'

At no time did the Respondent state a reason for my termination.''

Mr Healey's version, as it appears in his affidavit, was this:

''On 11 November 1994 upon my return to the city office in the afternoon, the Applicant was waiting, in the foyer on Level 2.

I asked the Applicant to come into my office on Level 2. After she sat down the Applicant said words to the effect:

'It is not very private here. Do you want to discuss things here?'

to which I then said to the Applicant words to the effect:

'If you're not happy here, we can go to Level 8.'

The Applicant and I then proceeded to take the lift to Level 8, where we went into my former office which was vacant but for packing boxes. I then sat on a box and said to the Applicant words to the effect:

'How are you? How did you go today?'

The Applicant then said words to the effect:

'Why aren't you fixing this up?'

I then said words to the effect:

'I've told you it is only a matter of getting the accountants together and letting them sort it out. McDonald [Mr Healey's accountant] has spoken to your bloke. I have always done the right thing by you. Maria, what is this really all about?'

The Applicant then said words to the effect:

'I'm prepared to give you until next Wednesday otherwise I'm going to advise the Tax Department that you haven't paid my tax.'

I then said words which, regrettably, included an expletive, to the effect:

'With that attitude you can get fucked. Maria, I've had a gutful of this. You know I've always done the right thing by you. What more can we do?'

The Applicant then said words to the effect:

'Are you terminating me?'

I then said:

'Suit yourself.'

The Applicant then said words to the effect:

'How much notice?'

I then said words to the effect:

'Don't worry about notice. We'll cope.'

The Applicant then left the office and went into the foyer and stood at the lifts. I followed the Applicant and said words to the effect:

'Maria, this is absurd. What is this really all about?'

The Applicant then left the city office premises.''

After she departed on Friday the 11th, it is common ground that the respondent rang Ms Bechara on Sunday the 13th. Mr Healey's evidence (in his affidavit) about that is as follows:

> ''On Sunday 13 November 1994 I telephoned the Applicant and during the course of the conversation said words to the effect:
>
> 'Can we resolve this? I do not wish you to leave.'
>
> The Applicant did not reply. I then said words to the effect:
>
> 'Where is the problem. I've agreed to resolve the tax matter. I have always treated you as if you were a partner.'
>
> The Applicant replied with words to the effect:
>
> 'Are you now offering the partnership to me for nothing?'
>
> To which I replied:
>
> 'No, on the terms we've discussed in the past.'
>
> The Applicant replied in words to the effect:
>
> 'I'm not like others. I'm not returning.'
>
> To which I replied:
>
> 'What about the clients? What about the cases coming on?'
>
> The Applicant replied in words to the effect:
>
> 'You'll cope. I do not wish to leave on an unfriendly basis.' ''

Ms Bechara gave the following evidence (in cross-examination) about this:

> ''You see . . . do you agree or do you not that after the discussion with you on 11 November between you and Mr Healey . . . whatever version, Mr Healey made it very plain to you, very shortly thereafter that he did not want you to leave? — Yes, he asked me back on the Sunday.
>
> Yes . . . well, did not he ask you back on the afternoon of the Friday? — I had no contact with Mr Healey the afternoon of the Friday . . . after the conversation.
>
> You see. You . . . can we take it that if you had accepted his offer to come back on the Sunday you were well aware that you could have walked straight into the Ashfield office on the Monday 14 November and just kept working, correct? — I would not have accepted his offer to come back after he terminated me.
>
> I understand what you are saying but the fact is is it not that if you had accepted his offer on the Sunday you knew well that you could walk straight into the Ashfield office on the Monday and start work? — As I have said, I would not have accepted the offer after the termination.
>
> Madam, would you answer the question? Was it your understanding that if you had accepted the offer on the Sunday to come back you could have walked straight into the office on the Monday morning and started work? — Well, I suppose I would have started back where I was.
>
> And as far as the situation was concerned, nothing would really have changed in terms of your work, is not that right? — Yes, but would my status have changed . . . or the status that he created?
>
> Just listen to what I am asking you? I am asking you questions? So, what you are saying is that he asked you to come back on the Sunday, correct? — Yes.
>
> He was asserting to you that it was his view that you were a consultant, correct? — When he called me on the Sunday he said we can fix up everything. Just come back.
>
> You understood that what he was saying was somehow he would get

these accountants or work out some arrangement to fix up this tax problem of yours, is not that right? — To fix up the tax problem?

The only outstanding argument between you and he really related as far as you were concerned to this tax group certificate? — I told him when he called me on that Sunday that I didn't think there was any need for my accountant to meet with his accountant. It was clear what he had to pay . . . give me the group certificate. Pay me whatever leave I was entitled to as well as any termination that I am entitled to and that was the end of it.

Just a minute. There was no tax that he had to pay on your version of being an employee only, is not that right? — Well, I asked him to present me with a group certificate. I said, I have given you till Wednesday. I will leave it open till Wednesday. I [sic] you could just do it by Wednesday? If you don't well you are going to force me to take the action.

When was that, on the 11th — On the Sunday.

On the Sunday. Just let us get this clear? He asked you back on the Sunday saying he could fix everything up for you, right? — Yes.

. . .

Did you say to him on the Sunday, 'I will give you more time, namely until Wednesday, to fix up the group certificate matter'? — No. I didn't say I would give you more time. I said, 'As I said to you on Friday when you terminated me, I will give you till Wednesday to provide me with a group certificate and pay me whatever I am entitled to'.

Well then, if he were to pay you . . . put it this way; if he were to give you the group certificate and done it by Wednesday, if he had . . .? — Yes.

. . . you could have gone back to work on the Thursday; correct? — I wouldn't have gone back to work.

I understand what you are saying. You were determined not to go back; is not that right? — That's right.

Even if he had given you a group certificate on the Monday morning at 8.45 you would not have been in the office at 9 o'clock; correct? — That's right.''

Three questions arise:

(1) was the applicant's employment terminated at the initiative of the respondent?

(2) if so was the termination unlawful? and

(3) in those circumstances what compensation, if any, is payable?

Problems of credit

An initial question arose, as it frequently does in these reviews, about how to treat issues of credit. The judicial registrar, it seems to me, found the credit of both parties to be not without blemish. That is my own impression too. The respondent's rather cavalier attitude to the taxation liabilities of his employees including those of the applicant, and to tax liability in general are an instance of his general credit not being faultless. An instance in relation to the applicant is her somewhat evasive response to questions about the completion of a statutory declaration in relation to tax deductions (at pp 176-177 of the transcript).

In the end, since the parties were content to rely on the record of proceedings before the judicial registrar, it was agreed that it was open to me to do one of two things: either (a) to assume that any impression or lack of impression I might have as to the credit of each party would not have been altered by their

demeanour; or (b) simply to regard the position, if I thought that knowing their demeanour would be necessary to resolve an issue, as being that such knowledge was not available and therefore, upon any issue where a party would bear the onus and the onus might be discharged by a question of whom to believe, based on general credit, such party would fail on that issue. (See *Wyndham Lodge Nursing Home Inc v Reader (No 2)* (1996) 65 IR 253.) In the event, I think questions of general credit count for little in this case.

Termination at initiative of employer

As to the first issue, it was the contention of the respondent that the applicant had made up her mind to leave Mr Healey's firm, taking with her some of his clients, and that she was deliberately provoking him to terminate her employment, so that either the termination was truly at her initiative and not his. In relation to this first issue, I think that the balance of the objective probabilities favours the applicant.

The background to the situation is this: at relevant times, the respondent was stretched financially and organisationally; he liked the applicant and thought of her as a very promising solicitor; their relationship was informal; the respondent would from time to time descend to the demotic in the language he employed in talking to the applicant, but she was a young person of well above average fortitude and little affected by transient, vulgar abuse. It is also necessary to understand that, although Mr Healey had previously threatened Ms Bechara with termination of her services, he had some sense of moral obligation to her, because he felt that she, along with one other member of his staff, in relation to some unexplained incident, had shown him particular loyalty.

As of 11 November 1994, I think that his attitude was that he would, when it was convenient for him to do so, take whatever steps were necessary to avoid trouble for her (although he did not know the extent of her anxiety on account of the previous tax audit of her affairs). He was, however, irritated that matters of considerably greater importance for him were being interrupted in, as he saw it, a fairly peremptory way, by the applicant. In particular, he took a very dim view of her threat to proceed in such a way that, before the best possible remedial steps would have been able to be taken by his accountant, his default would become known to the taxation authorities. I think that, in a rush of blood to the head, he told her that she was dismissed. I think that her version of events on the 11th is much closer to the reality of what occurred than his. However, one can see, comparing the two versions of the conversations, that it would not be inconsistent with a final acceptance of the essence of her story, that some of the things which the respondent says that he said might well have been said. Certainly they would have been in character for him. However, in the end, it was his unaided decision to terminate her services.

Unlawful termination

Mr Healey had no valid reason for terminating Ms Bechara's services. She was, as any employee would be, quite entitled to insist upon her employer's compliance with the law as to PAYE deductions. She had been forbearing of delay. She had her own quite proper, and quite properly private, reasons for concern. Her ultimatum was pointed but not unreasonable. Mr Healey had

established an ethos of blunt language between them. Nothing in her capacity or conduct or anything else warranted the termination of her services.

Non-acceptance of an offer of reinstatement, compensation and mitigation

It has been common ground that reinstatement would now be impracticable. I have no doubt that, by Sunday, 13 November 1994 things had moved on for both parties. On the respondent's part, he would have realised that, with a burgeoning practice among people of Lebanese origin at Ashfield, which practice was of predominantly litigious nature, he needed a litigation solicitor with the ability both to communicate in their first language and to relate culturally to Lebanese people, and that he needed such a person in short order. He also would have realised, I think, that he had been overbearing and coarse with a person who was a valuable employee, and who was after all doing no more than insisting upon her rights under the law. In short, he realised that he needed Ms Bechara back, and ought to make personal amends to her. He therefore rang her, I think, in a very conciliatory manner. I have little doubt that his conciliatory state of mind communicated itself to the applicant.

The respondent's primary submission, putting it at its highest against the applicant, is that she was, by Sunday, certainly planning to go and to steal some of the applicant's clients. The evidence does not go so far. Since about August 1994, in a perfectly proper, self-protective way, the applicant had made some inquiries about the labour market for relatively inexperienced young solicitors. Her inquiries were not very encouraging. She believed she had proved herself to be a quick learner, an able person at litigation and conveyancing, and possessed of a cultural background that was attractive to an available clientele like that of Mr Healey's Ashfield office. She felt, in a word, that she could make a go of practice in the Ashfield area. The evidence, in my opinion, at least shows that, by the Sunday, she had made up her mind that, the axe having fallen upon her, she might as well make the best of it and go into practice on her own account, although somewhat earlier than she might otherwise have wished.

The question arises whether the applicant was under a relevant duty to mitigate her loss and, if so, whether she did. One needs to judge this in the light of her claim that, in respect of her unlawful dismissal on 11 November, in addition to unpaid holiday pay etc, she should have compensation for three months' pay, that being the period of the reasonably notice that she ought to have had, if the respondent wished to terminate her services. After ''grossing up'' the $650.00 per week net to which she was entitled, this was a claim for something over $10,000.

In a practical sense, I think there is a duty upon an employee whose services have been terminated to mitigate the loss for which he or she seeks compensation pursuant to s 170EE(2) of the Act. So much is inherent in the notion of ''compensation'', upon which the unfair termination provisions of the *Industrial Relations Act* take their stand. ''[C]ompensation [in] such amount as the Court thinks appropriate'' is not necessarily the same as ''reimburse[ment of] any wages lost'', cf, for example, the former s 5(5) of the *Conciliation and Arbitration Act* 1904 (Cth). That was the formulation in relation to which Gray J, in *Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd (t/as Sunland Wholesale Meats)* (1988) 25 IR 137, concluded that:

> ''. . . it would be unjust . . . to allow an employer *convicted of an offence*

> under s 5 to take advantage of higher earnings which the dismissed employee may have earned during part of the intervening period. There can be no proper analogy with the obligations of a plaintiff to mitigate damages. There is no reason a dismissed employee should be regarded as working for the benefit of his or her former employer when earning a higher wage, particularly if that employee earned no wage, or a lower wage, for part of the intervening period. To take into account higher wages earned during part of the relevant period against lower wages earned during another part might lead to difficult comparisons. One job may involve remoteness, longer hours, less convenient shifts, or other factors of hardship, for which the employee receives more. In my view, the correct principle is to award to the dismissed employee *reimbursement of the full wage which would have been earned during any period for which the employee has been unemployed after the date of dismissal, together with the difference between what was actually earned and what would have been earned during any period for which the employee has been employed at a lesser wage, and to ignore any period during which the employee has been employed at a wage equal to or greater than that which would have been earned* . . .'' (Emphasis added.)

The present, different, statutory formulation renders that case distinguishable.

For lawyers, the essence of compensation is that a loss is to be made up for. This is a notion quite consonant with the ordinary meaning of that word. It is generally thought not to be just to make up for a loss which might reasonably have been reduced or avoided by the claimant for compensation. That is so in all cases of common law civil liability, whether tortious or contractual. I am not aware of any doctrine that a statutory right to ''compensation'' connotes, by contrast, a lack of obligation to mitigate the losses that are to be compensated. Indeed, if a loss might have been avoided by action an employee has unreasonably failed to take, it is difficult to understand what legislative policy or purpose might be served by mulcting an employer in purported compensation for such a loss. The relevant provisions of the statute are not penal. Neither is the compensation which may be awarded either a mere solatium or a discrete entitlement, such as a social security benefit, where considerations of reasonable self-protection might be misplaced.

In any case, the compensation is to be ''of such amount as the Court thinks appropriate''. There is plainly a discretion vested in the Court to award nothing if the Court thinks that appropriate. There is no reason not to adopt the guidance of the common law as to civil remedies. In actions for breach of statutory duty generally, eg, for damages for personal injury caused by unsafe work practices, it is beyond question that the plaintiff must mitigate. What, one may ask, is s 170EE(2) but a statutory form of action for breach of statutory duty?

One may also ask rhetorically how it could be just and proper to award compensation equal to three months' pay to an ex-employee for no work, if it were reasonable that the ex-employee have taken steps which might have resulted in the three months' pay being received and productive work therefor being done?

If Marshall J's decision in *Ferry v Minister for Health Western Australia* (1995) 64 IR 28 decides the contrary, then regrettably I must disagree.

Further, the primary remedy under the Act is reinstatement. Where, as here,

in my opinion, this was offered in good faith two days after the unlawful termination by Mr Healey and, as I see it, it was not impracticable for Ms Bechara to have accepted it or to have negotiated an acceptable variation of the offer, then, not having so accepted it, or taken reasonable steps to see it come to fruition, in my view, it is not appropriate that she be awarded any compensation.

The reasons for those factual conclusions are these. The applicant was an intelligent and capable young solicitor of above average appreciation of her own worth, as well as fortitude. She would, in my view, have been quick to see that, as of the 13th, she was in a good bargaining position, since the respondent had shown his need and/or conciliatory attitude in telephoning her. It is quite clear to my mind that she appreciated that the respondent wanted her back, was undertaking to sort out the tax problems and was in a position of some special need of her services. Nevertheless, she declined further to discuss returning to work with him. She preferred, as I have said, to set about immediately going into practice on her own account.

By Friday, 18 November she had procured the Law Society to shorten the qualifying time for her to be issued with the kind of practising certificate which would enable her to practise on her own account, and she had lodged her claim for unfair dismissal. Some point was made that she did this on the Friday without waiting for the following Monday, when an ultimatum she had issued would have expired, but there is no evidence from the respondent that he would actually have done anything on the Friday, and that she may have jumped the gun by a few hours does not seem to me to add anything of significance to the story.

One hesitates, perhaps from a misplaced sense of chivalry (which might now reasonably be denounced as patronising), to say of a young woman, to whom her male employer had spoken in offensive and vulgar terms, in circumstances where the employer has been in default in his obligations to the employee, that her reinstatement would have been practicable. But, for better or for worse, Ms Bechara was psychologically sturdier than most, and there had been a history of blunt speech between the pair. The respondent would have been obliged by the Court to take Ms Bechara as he found her, if she were more tender than most comparable employees. He is entitled to ask the Court to take Ms Bechara as the evidence shows her to be if it turns out, as it has, that she is tougher than most.

In support of the applicant, it was ably argued that there was a range of personal factors including professional insult by peremptory dismissal and verbal abuse, some history of rejected romantic advances by the respondent and, more seriously, a reasonable loss of trust and confidence by Ms Bechara based upon the respondent's long-continued failure to discharge his obligation to her in relation to her tax liability, including by furnishing to her an accurate group certificate, all accompanied by an earlier threat to terminate her employment. But at the risk of repetition, it needs to be stressed that this case falls to be determined on its own facts and upon a consideration of the personalities of the particular people involved. On an earlier occasion, when the respondent had sworn at her for raising the matter of the group certificate, the applicant had been so little concerned with his verbal excesses that she used the occasion actually to ask for a further increase in her pay. I think that, by November 1994, Ms Bechara understood and accepted that, so far as

arrangements that Mr Healey would finally make were concerned, he was rather worse in his bark than in his bite.

It was put on her behalf that she was wary of being on the open employment market over the approaching Christmas holiday period and the pre-Christmas period, and I accept that that would be a reasonable concern. However, if she had stayed to think about the matter (and she had five full days to think about it) she ought to have concluded rationally that the prospects of getting three months' work with the respondent, at a salary and on terms which were entirely satisfactory to her, were very high. On the evidence before me, the inference is that the respondent was in a jam, and was all but begging Ms Bechara to return. She must have realised this but rejected it in favour of going out on her own.

In my view, not to have stated clearly what more, if anything, she wanted from him in relation to reinstatement, not to have pursued the matter, not to have exercised her quite reasonable bargaining position with the respondent, was to act less than reasonably to mitigate her loss. In my opinion, because the prospects of practicable reinstatement were strong, there has been such a failure by Ms Bechara to mitigate her loss that there is no warrant to award her compensation. Indeed, I think it would be unjust to do so.

The case was dealt with upon the assumption that the recent amendments superadding an ''appropriateness in all the circumstances'' test before relief can be granted did not apply. If that assumption be incorrect (but cf *Nikoloska v Stirling Ethnic Aged Community Hostel* (unreported, Madgwick J, Industrial Relations Court of Australia, 12 April 1996)). I do not see anything in the amendments which would avail the applicant.

I decline therefore to award any compensation.