

CASENOTE: Roderick v Washington H Soul Pattinson Co Ltd (No 2) [2020] NSWSC 1224

Ms Roderick (also '**Employee**' and '**Plaintiff**') was employed by Washington H Soul Pattinson Co Ltd ('**Employer**' and '**Defendant**') as a senior executive from 2006 to 2018. On 12 April 2018, the Employee's employment as Finance Director was terminated without notice. At the time, Ms Roderick was the second most senior employee of the company.

The Plaintiff sought relief in the Supreme Court of NSW for notice, and for long and short-term entitlements under her employment contract. This casenote deals with several aspects of the Roderick decision, excluding the claim for long and short-term, set out under headings below.

Plaintiff's claim

The Plaintiff sought 24 months' pay in lieu of notice (and entitlements). Alternatively, the Plaintiff sought entitlements for the period during which she says she would have worked, but for the summary dismissal.

In July 2018, the Employer paid the Plaintiff three months' pay in lieu of notice, claiming it had no requirement to do so.

A. Background facts

Ms Roderick was initially appointed as chief financial officer, or CFO pursuant to a written contract. From 2014, Ms Roderick was promoted to Finance Director, appointed to the Board of the Employer and made a director of the Employer and its related companies. The Plaintiff was told she reported directly to the Board.

At the same time as the promotion, Ms Roderick was provided with a draft executive director employment contract, upon which she made notes. Ms Roderick attempted to discuss her employment contract and the notes with the remuneration committee, but a meeting never took place. The contract remained unsigned. The Plaintiff was invited to participate in short term and long term incentive schemes ('**STI**' and '**LTI**' respectively).

The Plaintiff had not obtained employment since April 2018.

After the termination of Ms Roderick's employment, the Board wrote to Ms Roderick noting that her LTI shares had not vested and were forfeited.

B. Plaintiff's performance and 'key performance indicators'

Justice Cavanagh of the NSW Supreme Court heard the Plaintiff's trial seeking relief.

The Defendant's evidence that the Plaintiff was 'failing' as finance director or otherwise not performing stood in some contrast to the objective evidence, such as performance reviews, Board minutes and the complete lack of negative feedback given to the Plaintiff. In particular, the Defendant's main witness (Mr Negus) did not have extensive direct experience of the Plaintiff's work, given that he was a member of the Defendant's remuneration committee and the Plaintiff reported directly to the Board.

His Honour found there were confidential discussions amongst the Defendant's senior employees about the Plaintiff's performance but that these discussions were not to the effect

that the Plaintiff's performance was poor. Cavanagh J declined to make findings of the truth of Mr Negus' evidence based upon the lack of evidence about performance.

C. Contract and variation

The Plaintiff contended that her role and duties (as CFO) altered to such a significant respect that the parties can be taken to have entered into a new and implied contract, to replace the pre-2014 agreement. This would be so, even if that contract was not rendered in writing.

The Defendant maintained that (absent the signing of a new contract) the Plaintiff was bound by her previous written agreement, the CFO contract. After examination of the CFO contract, his Honour found that few provisions of the CFO contract appeared (on their face) to apply to the employment of the Plaintiff in her position as Finance Director.

Justice Cavanagh noted the conversation about the 'new executive director contract' when Ms Roderick was promoted. His Honour found that this fact sets the proceeding apart from other cases. His Honour found that there was an objective intention to create a new contract of employment, despite not signing a contract and that such intention can be inferred including from the conduct of the parties. This was along the lines of rescission by conduct in Quinn v Jack Chia,¹ a well-known case on reasonable notice.

In finding an implied term of notice, Cavanagh J turned to consider factors particular to the Plaintiff. She was 49 years of age at the termination, and had worked as CFO and Finance Director for 12 years. The Plaintiff sought work (without success) since termination and would be unlikely to find further work at a senior level. His Honour found that 12 months' notice of termination was an appropriate period of reasonable notice. That notice was valued at \$690,000 (gross of taxation), or after deducting 3 months' notice already paid, a sum of \$517,500, which amounted to the fixed annual remuneration which would have been paid to the Plaintiff.

Rationale of the decision

In several respects, Roderick is a decision about formation and rescission of contract and the consequences of the contract *as agreed* not being consistent with the contract *as performed* by the parties. This is a familiar theme in employment law, both at senior executive and other levels.

The Roderick decision is otherwise notable, including for:

- the stated intention of the Employer, to form a new 'executive' employment contract;
- the breaches by that Employer and the substantial relief (totalling over AU\$1 million including incentive payments) which were ordered by the Court.

Significant here, is the Defendant's conduct of a senior employee's employment; it was fraught in some respects: first, in its basic administration of contractual entitlements (which contract was not signed nor otherwise rendered certain); and second the lack of coherent evidence about the Plaintiff's performance; presuming that was in fact the reason for termination.

Each of these factors contributed to extensive litigation and the relief ordered for the Plaintiff.

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23 September 2020

¹ (1992) 1 VR 567.