

CASENOTE: *Harden v Willis Australia Group; Willis Australia Group Services v Harden*
[2021] NSWSC 939 (30 July 2021)

Mr Harden (also '**Employee**') worked for Willis Australia Group Services Pty Ltd ('**Willis**' or '**Employer**') in various senior managerial roles for around 30 years; his final position was President of Willis Re Asia-Pacific pursuant to a 2016 contract of employment ('**Contract**'). Willis and Willis Re Ltd are part of a global professional services group providing advisory, insurance and reinsurance broking services.

Proceeding

This proceeding consisted of two separate applications: in the Harden proceedings, Mr Harden sought declarations to the effect that on 1 July 2020 Willis repudiated the Contract by directing that Mr Harden lie, by wrongly informing Willis' clients that he was on leave. Mr Harden sought relief including a declaration that he was stood down. In the Willis application, the Employer sought an injunction preventing post-employment conduct, such as soliciting clients, attempts to solicit any business away from Willis or enticing or assisting any person to do such things. In addition a permanent injunction was sought restraining Mr Harden from using any confidential information.

In addition to this relief, the applications raised issues of good faith breaches of the Contract; rectification of the Contract in equity; amongst others. This casenote focuses on the relief sought by the Employee, in respect of the putative lawful and reasonable direction.

A. Background

In March 2020, the Employee was informed that Willis would merge with a rival business, AON, effectively placing Willis under AON's control. The Employee stated that he did not wish to work with AON, and gave written notice of his resignation on 26 June 2020. The Employer wrote on 1 July 2020, placing the Employee on paid notice and giving directions including what to say if contacted by Willis clients. The letter stated relevantly:

5.3 *If a client of [Willis] contacts you by any means during your notice period, you are directed to say or reply only the following and nothing else:*

'I'm sorry I cannot assist you because I am on leave. You should contact John Phillipsz on [mobile number]. There's nothing further I can say at this time.'

5.4 *You are not permitted to tell the client that you have resigned or the details of your new employer or anything to this effect.*

The Employee criticised the July 2020 direction, set out above ('**Direction**'), claiming that it effectively required the Employee to lie, in breach of the Contract. The Employee sought a declaration that such breach enabled him to accept the repudiation of the Contract.

B. Employee's 'directions' claim

Sackar J of the NSW Supreme Court heard the two applications and considered whether the Direction was a direction to the Employee to lie. The Employee submitted that an instruction to be untruthful to clients was an instruction in breach of honest standards of conduct and thus could never be said to be in good faith and was a plainly unreasonable and/or unlawful direction, particularly when it involves a breach of the Contract.

Willis responded that the Direction was not repudiatory conduct, which conduct must be objectively identified as being 'substantially inconsistent' with the party's obligations under the Contract. It must be a renunciation of the party's obligations, either of the Contract as a whole or a fundamental obligation under it which was not present in this case.

C. Examination

His Honour **Justice Sackar** considered the effect of the Direction in the context of Mr Harden's resignation on 26 June 2020. Willis was clearly concerned about Mr Harden's resignation and went into damage control, through a desire to minimise the impact of Mr Harden's resignation on clients.

Sackar J formed the view that (under the Contract) the Employee was not on leave, rather he was in fact suspended from his usual duties and heavily restricted in those duties he could do. To then be directed to inform clients he was on leave, was a direction to the Employee to tell a deliberate untruth.

His Honour **Sackar J** disagreed with the Employee's analysis that it therefore followed that this direction was repudiatory, either of the Contract or an obligation under it. In respect of this direction, whilst it was a breach of the implied term of good faith in the Contract, it was accompanied by a positive statement of an intention not to repudiate; it was thus not a breach serious enough or fundamental enough, which would give rise to the right to repudiate, on the Employee's part.

The further direction that the Employee was not permitted to tell any clients he had resigned and/or who his new employer was, was not the subject of complaint by the Employee.

Significance of the decision

The fundamentals of employment litigation include the principles of offer and acceptance (as to formation of contract) and rescission and repudiation (as to the termination of that same contract). These are significant principles and it is necessary to have a grasp on the basics when either advising on, or litigating disputes of this kind.

It is those fundamentals which dictated the outcome (in respect of the disputed direction) in this case. Seldom does a superior court judge examine what are long-standing contract authorities of these types and kinds, routinely applied to management of employees and contracts. **Sackar J's** useful examination demonstrates issues relating to the drafting of senior and management-employee contracts, and some of the limitations of those contracts.

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