

TERMINATION OF SENIOR EXECUTIVES

Westfield v Adams
New South Wales Industrial Relations Commission
Wright, Walton & Boland JJ

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In *Westfield Holdings Pty Ltd v Adams* (2001) NSW IRC 293, Mr Adams, a senior executive, was made redundant after having been employed by Westfield for just over 3 years. Mr Adams subsequently brought an action in the NSW Industrial Relations Commission seeking a review of the terms of his contract of employment with Westfield on the grounds that it was 'unfair, harsh or unconscionable'. His annual remuneration package at the time of termination was worth about \$250,000.

On termination, Westfield provided Mr Adams with a redundancy package of \$280,705. This was comprised of:

- one month's notice (which he worked out).
- three months salary (\$62,500).
- the right to exercise 45,000 of 150,000 share options that Mr Adams held in Westfield (\$218,205). Under the terms of the option scheme, these options would otherwise have lapsed because Mr Adams had not accumulated 5 years service with Westfield.

That package was more generous to Mr Adams than his strict entitlements under his written employment contract.

THE INITIAL HEARING

At the initial hearing, the trial judge found the contract had been unfair because:

- there was no express provision made in the contract for severance pay in the case of redundancy;
- the discretionary bonus system under which Mr Adams could receive up to an additional 40% of his annual remuneration, was not based on specific criteria or performance measures; and
- no provision was made in the contract for any share options held by Mr Adams to be exercised where his employment was terminated by reason of redundancy.

The trial judge awarded Mr Adams compensation valued at more than \$1.4 million when totalled with what he had already received, as follows:

- an additional six months salary totalling \$125 000, in lieu of notice and for redundancy;
- a full bonus of \$100,000;
- the right to exercise all of the remaining 105,000 options held by Mr Adams that would otherwise have lapsed upon his termination, estimated to be worth about \$775,000; and
- interest (\$40,675).

FINDINGS OF THE FULL BENCH

On appeal, Westfield argued that the orders made by the trial judge had provided Mr Adams with a 'windfall gain' that was greatly in excess of appropriate compensation.

The initial orders were amended as follows:

- Mr Adams' entitlement to options was reduced. He was entitled to part of the options, in the same proportion as his approximately 3 of 5 years service (being 94,500 share options).

- The additional 6 months pay in lieu of notice and for redundancy was reduced to 5 months because Mr Adams had secured new employment following his termination, albeit as a consultant.

The Full Bench decision in this case is significant in that it demonstrates:

- Even relatively short-term executives may qualify for significant payouts in termination situations, especially redundancies, not necessarily limited by any formal contract terms.
- Compensation may be awarded even for discretionary bonuses.
- The Commission may adjust option entitlements and will not be bound by the strict rules of option schemes.
- The Commission may not significantly reduce an award of compensation just because the terminated executive has mitigated his or her losses by finding alternative employment.

The New South Wales Government has announced it will introduce legislation in the autumn session, which will significantly curb the compensation available to senior executives in these situations.

Joseph Moses' case note first appeared in Colin Biggers & Paisley's *Workplace Services Update* (March 2002) and is reprinted with permission.
