

# **Frustration of the Contract of Employment and Long Term Absence from Work**

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## **Abstract**

This paper considers the issues which arise when a worker becomes incapacitated for work and suffers a long-term absence from work. It examines the doctrine of frustration of the contract of employment and its contemporary application, and focuses particularly on a recent decision of *Hilton Hotels of Australia Limited v Pasovska* which purported to apply the important authority of *Finch v Sayers* which has been influential in the interpretation of the application of the doctrine in employment matters. The paper also canvasses the effect of provisions in workers compensation statutes on frustration where the worker has been absent for a lengthy period and examines a number of cases where industrial tribunals have found unfair termination of employment of long term injured workers who have been dismissed without full consideration of their capacity for work. The paper concludes by suggesting that the decision in *Finch v Sayers* should be reconsidered having regard to contemporary influences and changes in labour market regulations.

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## ***Introduction***

This paper considers the issues that arise when a worker becomes incapacitated for work and the contract of employment is put in peril by reason of long-term absence from work. As a consequence it examines the doctrine of frustration of the contract of employment and its contemporary application, and the effect of provisions in workers compensation statutes on the frustration of contract of employment circumstances.

The doctrine of frustration, in general terms, provides that a contract comes to an end by operation of law when the obligations become incapable of performance for reasons other than the parties' conduct or behaviour, most typically in the employment context, the death or serious injury of the worker. However, all State and Territory workers compensation statutes require employers to provide suitable duties to workers who are able to return to work, after a work related disability, within prescribed periods.<sup>3</sup> These so called return to work provisions limit the prerogative of an employer to terminate a worker's employment because they prevent the contract of employment from being terminated prior to the prescribed time limit. Arguably they also effect the operation of the doctrine of frustration. In examining the interaction of these concepts the paper examines the contemporary application of the case of *Finch v Sayers*<sup>4</sup> which has been influential in the interpretation of the application of the doctrine of frustration of contract in employment matters. In the final section of this paper the decision in *Finch v Sayers* is reconsidered having regard to contemporary influences and changes in labour market regulations.

## ***Frustration of Contract of Employment***

The doctrine of frustration of contract, as it applies to the contract of employment, generally provides that the contract of employment will terminate without any action on behalf of the employer or worker where it can be established that either or both of the parties to the contract of employment is unable by reason of circumstances or events beyond their control to perform or complete the contract of employment.<sup>5</sup> The event, which takes place, must be something which was not provided for or anticipated to be part of the terms of the contract.

The law in relation to frustration of contract was recently reviewed by Ipp J in *City of Subiaco -v- Heytesbury Properties Pty Ltd*<sup>6</sup> who observed (at para 71) that:

*In determining whether a frustrating event has occurred, regard may be had to all relevant circumstances. The evidence in question is not admitted so as to construe the contract and the parol evidence rule has no relevance. The purpose of the evidence is simply to show the change in obligations and that the contract cannot be performed*

<sup>3</sup> For example section 122 *Accident Compensation Act 1985* (Vic), section 84AA *Workers Compensation and Rehabilitation Act 1981*(WA), section 58B *Workers Rehabilitation and Compensation Act 1986* (SA).

<sup>4</sup> [1976] 2 NSWLR 540

<sup>5</sup> *Durham v Westrail* [1995] WAIRC 56 at per Sharkey P referring to various authorities mentioned below

<sup>6</sup> [2001] WASCA 140 at paras 66-71 (emphasis added).

*in the way contemplated by the parties. Thus, in Brisbane City Council v Group Projects Pty Ltd the economic and other consequences of the relevant event were examined. In Finch v Sayers [1976] 2 NSWLR 540, a case where it was said that a contract of employment had been frustrated, Wootten J took into account the nature of the illness of the employee, the prospects of recovery and other relevant matters.*<sup>7</sup>

Whether a contract of employment is frustrated is a question of law.<sup>8</sup> In the first instance it is a matter of construction of the employment contract.<sup>9</sup> This may require consideration of both the express and implied terms of the contract and as will be discussed below which terms if any can be implied. In *Davis Contractors Ltd v Fareham Urban District Council*<sup>10</sup> Lord Radcliffe said frustration occurs when "a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract". The party asserting that a contract has been frustrated bears the onus of proving not only the occurrence of the frustrating event or events, but also that these events were not caused by any default of that party<sup>11</sup>.

### ***Frustration of Contract in the Employment Context***

In the employment context, frustration of the contract of employment is most frequently at issue because the worker is unable to work due to illness. The question then is whether the worker's incapacity is likely to continue for such a length of time that further performance of the worker's obligations in the future would either be impossible or would be a thing radically different from the original duties.<sup>12</sup> The modern Australian rule in relation to frustration of employment contract as discussed in *Finch v Sayers* suggests that frustration of contract does not apply until all entitlements to sick leave; long service leave, annual leave and the like are exhausted.<sup>13</sup> Importantly *Finch v Sayers* is also instructive as to which terms may suitably be implied where long-term illness is a consideration.

### ***Finch v Sayers***

The facts in *Finch v Sayers* were that Finch was employed as the general manager of an importing company between 1965 and 1973. In 1970 his employer established a superannuation scheme which provided benefits to Finch and other employees. Benefits under the scheme were available to employees even if the employee was dismissed before retirement, unless the dismissal was due to conduct prejudicial to the employer's interests or dereliction of duty. Finch became ill in early 1973 and could not carry out his duties. He recovered from the illness in late in 1973. However in

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<sup>7</sup> Emphasis added. Interestingly it was not the finding of Wootten J that the contract in question was frustrated as implied by Ipp J.

<sup>8</sup> *Tsarkiroglou and Co Ltd v Noble Thorl GmbH* [1962] AC 93.

<sup>9</sup> *The Eugenia* [1964] 2 QB 226 Per Lord Denning at 239-40.

<sup>10</sup> [1956] AC 656 at 729. These principles were also accepted by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

<sup>11</sup> *F C Shepherd and Co Ltd v Jerrom* [1987] 1 QB 301.

<sup>12</sup> *Marshall v Harland and Wolff* [1972] 1 WLR 899 at 904.

<sup>13</sup> [1976] 2 NSWLR 540

July 1973 he was dismissed; the employer maintaining that the dismissal was due to “conduct prejudicial to the company’s interests or dereliction of duty”. It was argued that Finch was therefore not entitled to the superannuation benefits. When the matter came to court Wooten J held that Finch’s dismissal was due to his illness. The employer also argued that Finch’s contract was frustrated due to the illness and that is operated to defeat his claim to benefits under the scheme. In relation to the question of frustration of contract, in a long and careful judgment Wooten J observed (at 547):

*The proper starting point is today the same as that adopted by the judges in those days namely to ask what are the terms of the contract under consideration, and, where the express terms provide no answer, to ask what terms may be reasonably implied in a contract of the relevant sort, made between people in the position of the parties, assuming them to be reasonable men according to the standards of the day...*

*In this community the legislatures have either directly, or through the arbitration tribunals which they have set up, established a considerable array of minimum standards governing the rights of an employee to absent himself from work. Some of these provisions apply to all employees, including award-free executives, eg Annual Holidays Act 1944, Long Service Leave Act 1955. They may of course, be rendered inconsistent by federal awards, but these invariably make their own provision on such matters. Even where the legislation has stipulated the minimum standard only through awards, as is the case of sick leave under s 88c of the Industrial Arbitration Act 1940, the effect has rubbed off on to award-free employees such as executives, who are commonly accorded more favourable terms.*

At 558 Wooten concluded that;

*...it may well be that, in many areas of employment in contemporary society, particularly where one is dealing with an indefinitely continuing relationship, and not the performance of a specific task, there is relatively little room for the operation of the doctrine of frustration due to illness.<sup>14</sup>*

Thus after about 9 months of illness Finch’s contract was held not to be frustrated. *Finch v Sayers* has had a weighty influence of contract of employment cases. Although Wooten J cited the English decision of *Marshall v Harland and Wolff*<sup>15</sup> with approval it is arguable that there has been a difference in the application of the doctrine of frustration in the two jurisdictions.<sup>16</sup> This aspect is discussed below.

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<sup>14</sup> Emphasis given.

<sup>15</sup> [1972] 1 WLR 899.

<sup>16</sup> A comprehensive survey of authorities appears in *Egge and Peira v Department of Corrective Services* [1991] NSWIRC 19 (4 October 1991).

## *A Brief Review of the English Authorities*

The limited application given to the doctrine of frustration by Wootten J in *Finch v Sayers*<sup>17</sup> differs in some respects with a number of contemporary English decisions which suggest that there is room for frustration of contract due to illness<sup>18</sup>. For example in *Egg Stores (Stamford Hill) Ltd v Lebibovici*<sup>19</sup> the English Employment Appeal Tribunal (EAT) held that frustration of the contract of employment was possible in a situation where the worker under a short term periodic contract had been absent from work for only 5 months. In that case Phillips J. said (at 377):

*It is possible to divide into two kinds the events relied upon as bringing about the frustration of a short-term periodic contract of employment. There may be an event (e.g. a crippling accident) so dramatic and shattering that everyone concerned will realise immediately that to all intents and purposes the contract must be regarded as at an end. Or there may be an event, such as illness or accident, the course and outcome of which is uncertain. It may be a long process before one is able to say whether the event is such as to bring about the frustration of the contract. But there will have been frustration of the contract, even though at the time of the event the outcome was uncertain, if the time arrives when, looking back, one can say that at some point (even if it is not possible to say precisely when) matters had gone on so long, and the prospects for the future were so poor, that it was no longer practical to regard the contract as still subsisting.<sup>20</sup>*

Likewise in *Hart v A R Marshall & Sons (Bulwell) Ltd*<sup>21</sup> a worker who contracted industrial dermatitis in April 1974 was told by his employer in January 1976 that even though he was capable of returning to work there was no job for him. The EAT held the contract had been frustrated, noting that the applicant was a “key worker” and that it was reasonable in the circumstances that he had been replaced. More recently in *Notcutt v Universal Equipment Co (London) Ltd*<sup>22</sup> the English Court of Appeal held that a submission that a contract of employment was frustrated was made out after a worker who had a heart attack in late 1983 at aged 63 did not thereafter return to work. The worker and employer accepted that the worker was not going to work again following a discussion with reference to a medical report in mid 1984. The worker was given notice of termination by the employer and applied for sick pay under relevant English legislation. On appeal, the Court noted that the payment of sick pay was dependent on termination of the contract by the employer. The Court

<sup>17</sup> An earlier Australian case of *Simmons Ltd v Hay* (1964) 81 WN (Pt1) (NSW) 358 determined that a printery engineer was permanently incapacitated so he was not able to discharge his duties thus frustrating the contract. The facts in *Finch v Sayers* were not dissimilar given that Finch had been absent from work for an extended period.

<sup>18</sup> A discussion of the cases noted appears in McGarry G, J (1987) 'Master and servant - incapacitating illness of servant - frustration of employment contract'. *Australian Law Journal* 61 (1) January 35-36, McMullen, J (1977) 'Termination of the contract of employment by frustration'. *New Law Journal* 127(5819) 15 September 905-907, Manchester, C (1978) 'Frustration or dismissal?' *New Law Journal* 128 (5861) 13 July 674-676 and Samuels, A, L (1976) 'Frustration of contract'. *Solicitors' Journal* 121 (2) 14 January 25-26.

<sup>19</sup> [1977] ICR 260.

<sup>20</sup> Emphasis added.

<sup>21</sup> [1977] 1 WLR 1067.

<sup>22</sup> [1986] 1 WLR 641.

held that the contract had ended by virtue of frustration and not by the employer's notice. The decision indicates that the result in *Notcutt* was initially (as Wooten J had noted in *Finch v Sayers*) dependent on interpretation of the contract. In effect it was held that the contract was not intended to cover circumstances in which a totally disabled worker could continue to remain employed. This approach is consistent with *Finch v Sayers* to the extent the Wooten J also observed that the starting point in such cases is to consider the express and implied terms of the contract.

In perhaps the most important English decision (which as noted was cited with approval in *Finch v Sayers*<sup>23</sup>) is *Marshall v Harland and Wolff*<sup>24</sup> where Sir John Donaldson stated that "as a matter of law it is quite unnecessary to be able to point to a precise point of time at which the relationship was dissolved". In *Marshall* it was suggested that in order to determine whether the contract was frustrated by reason of illness or disability it was necessary to take into account the terms of the contract, including any sick leave provisions; how long the employment was likely to last in the absence of illness, the nature of the employment, the nature of the illness and how long it had already continued, the prognosis, and the period of past employment.<sup>25</sup>

In *Marshall* the facts, (which are seldom referred to in the judgments which cite the decision of Sir John Donaldson with approval), were that the applicant worker was employed by the respondent employer from 1949 as a shipyard fitter. He became ill in October 1969 and did not return to work. In 1971 the employer decided to close down the shipyards in which the worker had been engaged and gave him four weeks notice of termination of employment. The worker contested the notice on the grounds that he had been made redundant and should have been entitled to a redundancy payment which had been denied him by the employer. It is significant that the employer made no provision for sick pay and the worker had not been paid any wages during his absence. It had not been the practice of the employer to terminate workers on grounds of sickness. Medical evidence showed that the worker would not have been able to return to work at the time of hearing but following an operation the worker believed he would be able to return. Donaldson P held that the contract of employment was not frustrated as there was no evidence that the worker would be permanently incapacitated. Surprisingly, given the attention to this part of the judgment in subsequent cases it was noted by Donaldson P that frustration was only 'faintly argued' by the employer. Further he found that there were no grounds for holding that further performance of the contract was radically different or impossible to perform. In effect it was held that the termination was due to redundancy.

In *Marshall* there are several factual similarities with *Finch v Sayers*. In both *Marshall* and *Finch* the workers had been engaged over long periods, but neither contract of employment included a provision for sick leave and perhaps consequently the employers tolerated long periods of absence before taking any action to terminate the contracts of employment. In both cases the claims were made for payments other than compensation for unfair or wrongful dismissal. Likewise and perhaps most significant to the results in both cases, the medical evidence was inconclusive as to ongoing incapacity. In *Finch* a key element was the necessity to show that a term of the contract was an implied term which provided for sick leave. It is notable however that *Finch* was an award free executive employee, whereas *Marshall* was not in an

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<sup>23</sup> At 557-558.

<sup>24</sup> [1972] 1 WLR 899.

<sup>25</sup> [1972] 1 WLR 899 at 903-4.

executive position and was protected by the *Redundancy Payments Act 1965* (UK) and the *Contract of Employment Act 1963*(UK). The result in both cases was a finding that the contracts were not frustrated. Importantly Donaldson P, in contrast to Wooten J in *Finch*, noted (at 721):

*If he will never again be able to work, or if the period of incapacity has been or will be sufficiently long, the relationship of employer and employee will have come to an end by operation of law, ie frustration.*

## *The Effect of Awards on the Doctrine of Frustration*

*Finch v Sayers* was recently followed in *Hilton Hotels of Australia Limited v Pasovska*.<sup>26</sup> In *Pasovska* the New South Wales Industrial Relations Commission held that frustration of contract had not occurred in February 2000 even though the worker had ceased work with the appellant in 1993. The worker had suffered an injury to her back in 1989 and due to this injury became progressively incapacitated. She ceased work in November 1993 and in compensation proceedings in 1995 was declared to be totally incapacitated. She did not resign her position and the employer took no action to terminate her employment. In 1999 the worker's solicitor wrote to her employer making a demand for unpaid leave, which was eventually paid to the worker in February 2000 calculated on the basis that her employment had ceased in 1995. The worker took issue with the calculation of the payments and the matter proceeded to the New South Wales Industrial Relations Commission on the question of whether the worker's contract of employment was still on foot after 1995. The Commission observed that most cases dealing with frustration of contract had not been decided in the context of industrial awards or agreements. The Full Court said;

40 *Since the judgment of Wootten J in Finch v Sayers there does not appear to have been, with one possible exception, any Australian decision which has applied the doctrine to award employment. Although standard texts recognise the existence of the doctrine in this area, that cannot be decisive. For example, Professors Carter and Harland deal with the matter in this way in the 4th edition (2002) of their Contract Law in Australia (Butterworths) at p 776 in paragraph [2015]:*

41 *Where the contract does not involve a specific task, but instead envisages a long-term relationship, it will be more difficult to establish that the contract has been frustrated by a temporary incapacity. Apart from the difficulty of identifying the period of the incapacity, and its impact on the contract, modern contracts of employment frequently contain provisions dealing with sickness benefits. Moreover, superannuation schemes frequently provide for retirement in the event of permanent medical incapacity. These may leave little room for discharge under the doctrine of frustration. But if an employee is incapacitated for what will, in all probability, be an unreasonably long period of time, the contract must usually be frustrated...*

42 *On the other hand, the reliance by the courts on the doctrine of frustration in the area of employment law has been the subject of some criticism by academic commentators (for example, Collins, Ewing & McColgan, Labour Law: Text and Materials, Hart Publishing, Oxford, 2001, pp 535 - 540). As Bristow J, sitting in the Employment Appeal Tribunal, said in a case cited in that volume, Harman v Flexible Lamps Ltd [1980] IRLR 418 at 419:*

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[2003] NSWIRC 17.



*In the employment field the concept of discharge by operation of law, that is frustration, is normally only in play where the contract of employment is for a long term which cannot be determined by notice.<sup>27</sup> Where the contract is terminable by notice, there is really no need to consider the question of frustration and if it were the law that, in circumstances such as are before us in this case, an employer was in a position to say 'this contract has been frustrated', then that would be a very convenient way in which to avoid the provisions of the Employment Protection (Consolidation) Act. In our judgment, that is not the law in these sort of circumstances.*

43 *The situation in this State is however affected, as it is in all Australian jurisdictions, by comprehensive long service leave legislation. The New South Wales Long Service Leave Act 1955 was one of the examples given by Wooten J in Finch v Sayers of a situation in this community which his Honour described as the establishing of "a considerable array of minimum standards governing the rights of an employee to absent himself from work". That statute, however, has a number of significances in the present situation. First, it is the basis of one of the respondent's claims before the magistrate and before this Court. Second, a consideration of its terms shows the limited scope for the operation of the doctrine in award regulated employment.*

44 *The Long Service Leave Act provides valuable benefits to an employee, the existence and quantum of which depend, not upon work - as payment of wages often does, but on continuing service or employment. Section 4(1) of the statute provides that "every worker shall be entitled to long service leave on ordinary pay in respect of the service of the worker with an employer". Sections 4(4) and 4(4A) provide that the long service leave is exclusive of annual holidays and public holidays during the period of leave.<sup>28</sup>*

### ***A Closer Look at Pasovska.***

The judgment of *Pasovska* bears closer examination. The Commission relied on a combination of citations from established texts (which no doubt in turn relied on *Finch v Sayers*), together with a selective combination of English authority. For example, it appears that the comments in the final sentence in paragraph 41 the opinion of the learned authors referred to (which supports a finding that a contract could be frustrated) did not carry much weight, given that the worker in this case had been absent from work for over 7 years at the time the matter went on appeal. Importantly the authorities cited in support for the view that the failure to give notice is critical, in paragraph 42 above are English, but there does not appear to be reference to another line of English cases cited herein which resulted in findings that the contract of employment had been frustrated. In *Marshall*, Donaldson P had made it clear (at 719) that it was not necessary to point to a definite time at which the relationship was dissolved by frustration. In addition, there does not appear to be any

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<sup>27</sup> This is a curious comment given there is an abundance of English authority to the contrary view.  
<sup>28</sup> Emphasis added.

authority upon which Bristow J (sitting in the EAT) in *Harman v Flexible Lamps Ltd* asserts that “(w)here the contract is terminable by notice, there is really no need to consider the question of frustration”. Although reference is made (in paragraph 42 of the judgment) to the potential to avoid the consequences of the *Employment Protection (Consolidation) Act* (UK) to support the aforesaid proposition. There is in fact contrary English authority on this point. In *Notcutt v Universal Equipment Co (London) Ltd* above Dillon LJ citing the same Act referred to the issue of the availability of notice at 645-6, he said;

*For my part, as a periodic contract of employment determinable by short notice or relatively short, notice may none the less be intended in many cases by both parties to last for many years and as the power of the employer to terminate the contract by notice is subject to the provisions for the protection of employees against unfair dismissal now in the [Employment Protection Consolidation] Act 1978, I see no reason in the principle why such a periodic contract of employment should not, in appropriate circumstances, be held to have been terminated without notice by frustration according to the accepted and long established doctrine of frustration in our law of contract. The mere fact that the contract can be terminated by the employer by relatively short notice cannot of itself render the doctrine of frustration inevitably inapplicable.<sup>29</sup>*

It might be argued that *Pasovska* was not a case involving a periodic short-term contract and that these comments are not apposite, nevertheless the comments of Dillon LJ on the question of notice are important. It is clear from the decision in *Pasovska* that considerable reliance is placed upon the fact that notice provisions in the award could have been utilised by the employer to terminate the workers employment. The weight attached to this latter issue by the Commission is arguably disproportionate and consequently a departure from *Finch v Sayers*. Wooten J did not refer specifically to this question. He did note (at 558) that in *Marshall* the question of whether notice had been given was a factor which the courts could take into account in determining whether the changed circumstances were so fundamental as to strike at the root of the relationship. The question of notice in relation to short term periodic contracts was specifically addressed at length in *Hart v A R Marshall & Sons (Bulwell) Ltd*.<sup>30</sup> Phillips J (for the majority) said (at 542-3):

*Experience in such cases shows that parties very often drift along in this situation for long periods of time during which the employee has ceased to do any work, or to be able to do any work, but has not been formally dismissed. The legal position seems to be that the employee is still employed although he is not in receipt of wages, and that his employment continues until he is dismissed or the contract is frustrated and comes to an end by operation of law. In these circumstances, while we think it right to attach considerable importance in a case of this kind to the failure by the employer to dismiss, it is we think, impossible to say that unless the employee is dismissed the contract must always be taken to continue. To do so*

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<sup>29</sup> Emphasis added.  
<sup>30</sup> [1977] ICR 539 (Emphasis added).

would be tantamount to saying that frustration cannot occur in the case of short-term periodic contracts of employment.... In truth the employers are in a difficulty in this connection. First of all, if they dismiss the employee prematurely they may be said to have dismissed him unfairly: here we have suggested that the test is whether the employer can reasonably be expected to wait any longer: *Spencer v Paragon Wallpapers* [1977] ICR 301. Secondly, if the employer takes on a temporary replacement pending the recovery of the sick employee, there is a risk that he will be obliged to pay him compensation if he dismisses him when the sick employee has recovered; and even if he guides himself by our decision in *Terry v East Sussex County Council* [1976] ICR 536 he is probably buying litigation.

Furthermore, we are very conscious of the fact – and attach much importance to it- that if frustration can never occur in such cases employers will feel obliged to dismiss employees in cases where they at present do not do so. In the long run, it is the employees who would be the losers.

In our judgment it comes to this. The failure of the employer to dismiss the employee is a factor, and an important factor, to take into account when considering whether the contract of employment has been frustrated. But it is not conclusive. The important question, perhaps, is to look to see what was the reason for the failure. It may be due to the fact that the employer did not think that the time had arrived when he could not reasonably wait any longer, in which case it is a piece of evidence of the greatest value. Or it may be a cases where the failure to dismiss is attributed to the simple fact that the employer never applied his mind to the question at all.

It can be seen that Phillips J was alert to the potential for workers to be harmed if in fact the doctrine of frustration was not applied in circumstances where notice had not been given. What is the impact of these authorities on the Australian cases? Arguably they can be distinguished as they deal with short-term periodic contract; however it is hard to see this as a relevant factor, if the potential for the employer to give notice is the same in each case. *Hart v A R Marshall & Sons (Bulwell) Ltd* does not appear to have been considered in *Pasovska* although *Marshall v Harland and Wolff* and *Notcutt v Universal Equipment Co (London) Ltd* were cited with approval.<sup>31</sup> Yet *Hart v A R Marshall & Sons (Bulwell) Ltd* is still regarded as sound authority by the United Kingdom Employment Appeals Tribunal.<sup>32</sup> The focus of the

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<sup>31</sup> These cases have also been consistently followed in UK, see for example recent examples in *Bateman v Watts* [2001] UKEAT 338\_00\_2611 at para 18, *Collins v The Secretary of State for Trade and Industry* [2001] UKEAT 1460\_99\_3101 at para 21 and *Verner v Derby City Council and Others* [2003] EWHC 2708 at para 63.

<sup>32</sup> Cited with approval in *Hogan v Cambridgeshire County Council* [2001] UKEAT 0382\_99\_2607. There are some UK cases where frustration has not been made out for long term absences, for example *Maxwell v Walter Hamilton Designs* [1975] IRLR 105 which decided that a contract of employment was not frustrated when worker who had been absent from work for 18 months.

New South Wales Industrial Relations Commission in *Pasovska* appears to be the broad question of whether frustration of contract has any application to the contract of employment, *rather than the specific question of whether the contract would be either impossible or radically different from those existing under the terms of employment?*<sup>33</sup> In *Pasovska* the worker was protected by an award, which among other things set out the means by which a worker could be given notice. No notice has ever been given by the employer in *Pasovska*. The Full Bench seemed to attach considerable and arguably excessive significance to this and concluded;

54 *Notwithstanding this situation, we do not consider that the circumstances of the respondent's employment, including its history, the nature of the employment, the nature of the award coverage and the circumstances in which payment of accrued entitlements came to be made, permit any available scope for the operation of the doctrine of frustration. In any event, we do not consider that the appellant has discharged the onus on it in that respect. We do not consider that the respondent's employment, regulated by comprehensive award provisions and statutes such as the Long Service Leave Act, could be said to require for its effective operation implied terms as to termination of employment or provide any basis for the doctrine to operate. The employer had ready means of terminating employment at short notice and incapacity of a worker would, subject to any other statutory protection (see, for example, the present s 93 of the Industrial Relations Act 1996), provide a readily available basis for termination of employment.<sup>34</sup>*

The Full Bench declared that the worker's employment had continued up until February 2000 when the employer had forwarded what it thought were the correct leave entitlements to the worker. In effect this meant the worker had remained employed since 1993 notwithstanding that she had not worked for nearly 7 years and had been declared totally incapacitated for work in 1995. At this point is worth returning to the facts in *Finch v Sayers*. It is noteworthy that in *Finch v Sayers* the worker was an executive who had been absent from work for less than a year. In addition Finch actually recovered from his illness. In *Pasovska* the worker never recovered and was declared totally incapacitated for work. There is a clear distinction to be made on the facts. Wooten J in citing *Marshall v Harland and Wolff* with approval required that a tribunal give attention to a range of factors. The English authorities suggest that no one factor is determinative. The failure of an employer to give notice needs to be weighed against all of the other factors. In *Pasovska* it is clear that the employer "never applied his mind to the question (of notice) at all" which is hardly surprising because the worker had been declared totally incapacitated for work by a competent tribunal and was paid workers compensation in accordance with that declaration. With respect the New South Wales Industrial Relations Commission does not appear to have attached sufficient weight to that very important factor and erred in law. It also failed to distinguish *Finch v Sayers* on the facts. Clearly there is no comparison on the facts between the cases.

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<sup>33</sup> Per Donaldson in *Marshall v Harland and Wolff* [1972] 2All ER 715 at 718.

<sup>34</sup> Emphasis added.

There is a line of cases which suggests that if the employer behaves in a way that is consistent with the contract of employment continuing, such as continuing to liaise and accept sickness certificates from the worker, that the employer will be estopped from invoking the doctrine of frustration or denying that the worker has a continuing expectation of work.<sup>35</sup> On the facts this was not the case in *Pasovska*. The employer seems to have had virtually no contact with the worker from 1995 (when the Chief Justice of the Compensation Court of New South Wales held she was totally incapacitated as from November 1993) until November 1999 when her solicitor wrote to the employer seeking to engage the employer in discussions concerning payment of entitlements.

### *The Consequences of Pasovska*

Since the publication of the decision in *Pasovska* some consternation has been expressed as to its likely effect. A number of law firms issued client newsletters advising that employers should expressly terminate the contract of employment when an employee becomes totally incapacitated for work. Payment of accrued annual leave and long service leave would not, it was suggested be determinative by itself.<sup>36</sup> The *Pasovska* decision highlights the necessity for the employer to give express notice to a worker in accordance with any award or industrial agreement.<sup>37</sup> The prediction made by Phillips J in *Hart v A R Marshall & Sons (Bulwell) Ltd* has in fact come to pass. It might be that *Pasovska* was a (somewhat unexpected) victory for one worker but it may be that the decision has negative consequence for other workers.

One factor which needs to be considered is that The requirement of employers to give notice (to work injured workers) has to take account of the return to work provisions which are contained in the various Australian State workers compensation Acts. These provisions whilst not uniform generally provide that an employer of a worker who has suffered a work-related injury or disease is obliged to provide employment for that worker for up to 12 months from the date of the disability. The effects of the return to work provisions are discussed below.

*Pasovska* also raises the question of the appropriate length of time before an employer can give notice in the case of a worker who apparently cannot return to work? The Industrial Commission of South Australia dealt with this issue in *Filsell v District Council of Barossa*<sup>38</sup>. Filsell was a weekly paid employee whose sick leave credits had all been used. He has on unpaid sick leave for twelve months prior to his dismissal. The Commission held that the period of twelve months following the expiration of sick leave credits before notice of termination was given was

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<sup>35</sup> *Fisher v Edith Cowan University (No2)* 1997 WA Industrial Relations Commission 464 at 472 (continuing expectations of employment where short term contract), *Norfolk CC v Secretary of State for the Environment* [1973] 3 All ER 673 (acceptance of medical certificates) and *Hebden v Forsey & Son* [1973] ICR 607 (failure to give notice).

<sup>36</sup> P Copeland "Doctrine of Frustration of Little Application Where Employee Unable to Perform Employment Contract Due to Incapacity" *Workplace Corrs* June 2003 p 8. "Award Employment not Subject to 'Frustration' Doctrine" *Client Update Employment & Industrial Relations Bulletin No 2 April 2003* Carroll & O'Dea Lawyers *Workplace and Employee Relations Law Update – June 2003* Mallesons Stephen Jacques.

<sup>37</sup> Although as a matter of law, if a contract is frustrated there is no need to give notice per *Denny, Mott and Dickson Ltd v James B Fraser and Co Ltd* [1944] AC 265.

<sup>38</sup> [1992] SAIR 102.

reasonable. Importantly in *Filsell* the Commission observed<sup>39</sup> that there was no reliable medical evidence that would indicate that the worker was fit to return to work.

This issue was also touched on in *Vegh v Santos Ltd*<sup>40</sup>. In *Vegh* the respondent employed the worker for 19 years. He suffered from manic depression. He was able to continue work for the respondent throughout this period although he was given written advice that his performance was deficient. He ceased work in October 1991 and was hospitalised on at least two occasions. In April 1992 the worker was dismissed whilst in hospital undergoing treatment. Notice of the worker's dismissal was given to his medical practitioner who had attended a meeting on the workers behalf, as he was too ill to attend personally. The worker brought a claim for unfair dismissal. A central issue in the case was that the worker had not been given the option of resigning in order to take advantage of a superannuation scheme which provided for total disablement nor was this drawn to his attention. It was held that insufficient time had been allowed to elapse before notice was given. In part this was because of a failure to properly assess the available medical evidence.

A similar decision to *Vegh* is *Frankcom v Tempo Services Pty Ltd*<sup>41</sup>. In *Frankcom* the worker was employed as a part time cleaner from July 1992 who injured her lower back in December 1993. She was certified unfit for work as from January 1994. She attempted to return to lighter duties in March and April 1994 without success. She was dismissed in May 1994. Deputy President Stevens summarised the authorities thus:

*Distilled to their essence, the key considerations appear to be whether a reasonable period of time elapsed between the date of injury and the date of the dismissal, and in that respect, whether there was a pressing or other necessity requiring the employer to take action to terminate, whether the employee had acted properly towards the employer in terms of conduct and rehabilitation and whether there was a consultation about the absence with the employee and attempts made to explore alternatives to dismissal*

*The cases with respect to what constitutes a 'reasonable period of time' seemed to cover the question from the perspective of both employee and employer. From the employee's perspective, did the employee have reasonable length of service and an expectation of ongoing permanent employment, and furthermore did the employee take all reasonable steps towards rehabilitation. From the employer's perspective, did the employer suffer a detriment from the absence of the employee, and did it have difficulty in making arrangements to carry on its operations in the employee's absence?*<sup>42</sup>

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<sup>39</sup> In doing so the Commission may have come dangerously close to reversing the onus on proof suggested in cases discussed above that the employer must prove that he worker cannot return to work.

<sup>40</sup> [1994] SAIRC 7.

<sup>41</sup> [1994] SAIR 80.

<sup>42</sup> At 4.

Interestingly these cases do not seem to have been cited elsewhere, in relation to the question of notice<sup>43</sup>. This probably reflects the influence of the provisions of the *Workplace Relations Act 1996* (Cth) which make it unlawful to dismiss a worker on the grounds of temporary incapacity, as well as the increased use of provisions in State anti-discrimination legislation and the *Disability Discrimination Act 1992* (Cth) which prevent discrimination on the grounds of disability. In addition the return to work provisions in State workers compensation legislation influence the period over which an employer must retain the services of a worker with a work related disability. These latter provisions are discussed below.

### ***Workers' Compensation Rehabilitation and Return to Work Provisions***

In an effort to address the issue of return to work for disabled workers all States have inserted provisions in their workers compensation legislation which attempts to provide some employment security for disabled workers as part of a rehabilitation process. These provisions commonly require the employer to attempt to re-employ a disabled worker if the worker is able to recommence some form of work within 12 months of the date of injury or the onset of disease.<sup>44</sup> The obligations on employers usually do not apply if it is not “*reasonably practicable*” to provide “*suitable duties*” or if the worker has been dismissed on the grounds of “*serious and willful misconduct.*”<sup>45</sup>

There are a number of noteworthy features of the return to work provisions. Firstly, with few exceptions they provide a penalty for employers who do not comply and are, therefore, in essence criminal provisions rather than provisions that create any enforceable rights for workers. This point was made in a case before the Australian Industrial Relations Commission where allegations of unlawful or unfair dismissal had been made. In *Fernandez v COM group Supplies Pty Ltd*<sup>46</sup>, Ritter JR considered a case where a worker had been dismissed in the course of a rehabilitation program. The employer maintained that the worker had abandoned her duties, while the employee maintained that she had gone home sick from her work injury. Ritter JR found the employer in breach of the *Industrial Relations Act 1988* (Cth) and ordered payment of compensation for unfair dismissal. In relation to section 84AA of the *Workers Compensation and Rehabilitation Act 1981*(WA) which is a return to work provision he noted as an aside that;

*I find that but for the respondent's contravention of the (Industrial Relations) Act the employee would have been likely to have remained employed with the*

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<sup>43</sup> *Vegh v Santos Ltd* has been cited with approval in *Zemgailis v Hi Trans Express Pty Ltd* [2002] SAIR 20 in relation to the requirement of an employer to properly advise an employee of his/her entitlements on resignation.

<sup>44</sup> These types of provisions have a long pedigree. Commencing with provisions which deemed partially incapacitated workers as totally incapacitated where the employer could not provide employment. Most notable is section 11 of the *Workers Compensation Act 1926* (NSW) which provided that in the event that the employer was not able to provide suitable work for the partially disabled worker the employer would (subject to certain requirements) be obliged to pay the worker as though they were totally incapacitated. There is a considerable body of cases that discuss the concept of “mutuality” which describes the obligation of the worker to be ready willing and able to accept suitable duties when offered by the employer. See for example *R. J Brodie (Holdings) Pty Ltd v Pennell* (1968) 117 CLR 665 and *Dowell Australia Ltd v Archdeacon* (1975) 132 CLR 417. In *Dowell* Mason J described the burden imposed on the employer by section 11 as “intolerable”.

<sup>45</sup> Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* (WA).

<sup>46</sup> AIRC Print (950656) 22 June 1995.

respondent. Indeed, Mr. Melville drew to my attention Section 84AA of the Workers' Compensation and Rehabilitation Act (Western Australia) 1981 (as amended). The effect of the section is to make it an offence if an employer does not preserve the employment of a "worker" injured at work for a period of twelve months from the date of the incapacity. Further, Section 84AA (4) excludes periods of total incapacity for work in calculating the 12 month period. The applicant's injury occurred on 5 July 1994, so the employer would have had to preserve her employment until beyond 4 July 1995, given her periods of total incapacity for work.<sup>47</sup>

The question of whether such a return-to-work provision gives rise to a duty of the employer to provide work, or re-employ a disabled worker, or gives rise to any private rights on the part of disabled workers, was discussed by the Victorian Supreme Court in *Gardiner v State of Victoria*.<sup>48</sup> In *Gardiner*, the worker had resigned but then claimed a right to re-employment. Section 122 of the *Accident Compensation Act 1985* (Vic) (the Victorian equivalent to section 84AA) was considered not to create any private civil rights for workers. Thus in most cases an employer, who does not comply with such a provision, by providing suitable work for a current employee may be liable for no more than a fine.<sup>49</sup> Given the decision in *Gardiner*, return-to-work provisions such as section 122 of the *Accident Compensation Act 1985* (Vic), and probably in other States such as Western Australia (which is similar), do not currently provide any right to *suitable duties* if the contract of employment has been terminated at the volition of the worker.

Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* (WA) was specifically referred to by Commissioner Beech in *Stockwin v Cablesands Pty Ltd*.<sup>50</sup> The employee submitted that he could not be dismissed because section 84AA prevented the employer from dismissing the employee within 12 months of the date that compensation was first paid. The Commissioner accepted that section 84AA required the employer to preserve the employee's position for 12 months until the employee returned to work, unless the employee was dismissed for serious and willful misconduct. The Commissioner found that section 84AA had no application in this case, because the employee had not been able to return to work within the 12-month period prescribed. He noted that despite section 84AA, it was still possible for the employer to dismiss the employee. He also observed that even if the *Workers' Compensation and Rehabilitation Act 1981* (WA) prohibited a specific act; it did not necessarily mean that the act done had no effect. He noted however, that a dismissal in such circumstances might amount to an unfair dismissal.<sup>51</sup> It might also be that reinstatement was an appropriate remedy for the employee/worker. Commissioner Beech also made reference to section 84AA in *Pacey v Modular Masonry*.<sup>52</sup> In *Pacey*, the worker claimed his dismissal was unfair because he was receiving workers' compensation. He relied on section 84AA. The Commissioner observed:

*Therefore, if an employer does dismiss an employee who is absent from work on Workers' compensation for a reason other than serious or willful misconduct,*

<sup>47</sup> Emphasis added.

<sup>48</sup> [1999] VSCA 100.

<sup>49</sup> The exception is New South Wales which provides a mechanism for reinstatement. (1997) WAIRC 528/96 7 January 1997.

<sup>51</sup> A similar comment was made in *Mumby v Telstra Corporation Limited* AIRC 873/99 P Print R7673 (29<sup>th</sup> July 1999) in relation to the application of similar Commonwealth workers' compensation provisions to the *Workplace Relations Act 1996* (Cth).

<sup>52</sup> (1998) WAIRC 1468/97 13 March 1998.



*the dismissal may well be of no effect where the employee attains partial or total capacity for work in the 12 months from the day the employee becomes entitled to receive weekly payments of compensation from the employer. Therefore, since section 84AA came into effect an employer should not use the employee's absence on Workers' compensation as a reason to dismiss the employee particularly where, as in Mr. Pacey's case, the absence had only just commenced and its duration is just not known. (In that respect, the Workplace Relations Act 1996 (Cth) in section 170CK (2) (a) contains a similar, though not identical, restriction on dismissing an employee by reason of temporary absence from work because of illness or injury). If an employer did so, the dismissal may, depending upon the circumstances, be harsh or oppressive against the employee and amount to an abuse of the right to dismiss.*

The Commissioner went on to find that, in fact, the dismissal of Mr. Pacey had been harsh and oppressive.<sup>53</sup> An order for compensation was made, but an order for reinstatement was not made on the grounds that section 84AA would, if Mr. Pacey became fit for work, entitle him to return to work in any event. It will be observed that the Western Australian Industrial Relations Commission had little difficulty in accepting that section 84AA applied to its deliberations. Yet, there is nothing in the *Workers' Compensation and Rehabilitation Act 1981 (WA)* or the *Industrial Relations Act 1979 (WA)*, which gives the Commission jurisdiction to deal specifically with such matters. It follows that the return to work provisions do affect the operation of the doctrine of frustration in relation to those workers who make compensation claims because the provisions require the contract of employment to be kept on foot during the operative (usually 12 months) period.

### ***Alternative Duties and Frustration of Contract.***

Some vexed issues arise where the worker returns to work but does not perform the duties for which they were originally employed. In general terms the rehabilitation and return to work provisions of Australian workers' compensation statutes require the employer to provide duties suited to the incapacity or capacity of the worker. These duties may be described as light, restricted or alternative, but in any case they are not wholly, or indeed sometimes at all, those provided for in the original contract of employment. It is arguable that a worker who returns to work on alternative duties commences a new contract of employment, the previous contract of employment having been abandoned, terminated by consent or frustrated by operation of law. In which case what is the state of the varied contract? Is the worker entitled to argue that there is a new or varied contract on foot? A good example of the interaction of these matters is *Foster v Copper Mines of Tasmania Pty Ltd*<sup>54</sup>. In *Foster* the worker had been dismissed purportedly on the grounds that for 15 months he had been unable to perform his full range of duties having suffered a work related accident. He was performing alternative duties at the time of his dismissal. The employer relied on the doctrine of frustration to end the contract. Commissioner Simmonds said (at para 18);

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<sup>53</sup> In *Carrigan v Darwin City Council* the Federal Court Print 970101 20 March 1997 held that the equivalent Northern Territory return to work provisions, (75A of the *Work Health Act (NT)*) could be taken into account to assess whether the employer had acted in good faith, noting that these provisions in effect required the employer to assist the worker with rehabilitation. A breach of the return to work provisions might therefore be a breach of the common law implied duty of trust and confidence.

<sup>54</sup> [2002] PR 925813 18<sup>th</sup> December 2002 (emphasis added).

*Consistent with the requirements of the applicable workers compensation legislation, the company provided Mr. Foster with alternative duties and he continued performing those alternative duties for a period greater than twelve months. The legislation only requires that he not be terminated from employment for a period of twelve months. If his pre-injury duties constituted his contract of employment, then the contract was varied or substituted as a consequence of the operation of the legislation and, after the expiry of the twelve month period, the varied or substituted contract was continued by consent. Furthermore, the requirement to perform alternative duties was not artificially contrived. The company apparently advised its insurer, from the outset of its claims in respect of Mr. Foster, that he was able to be placed in full-time gainful employment which was sufficient value so as to not require any contribution from the insurer.*

Commissioner Simmonds held the contract of employment was not frustrated and said (at para 19);

*...contrary to that finding (that the contract was frustrated), his pre-injury contract required the performance of duties which, because of his injury he was unable to perform, that contract was varied when the company provided him with alternative duties, consistent with the requirements of the legislation. The varied contract continued after that period required by the legislation, by consent. There is no evidence that the varied contract was frustrated.<sup>55</sup>*

The Commissioner therefore held the dismissal of the worker whilst on alternative duties was unfair. This was because the company did not communicate to the worker that it was bringing his contract to an end based on medical evidence in its possession which indicated he would not be able to return to full duties. The report was stale and the worker was not given an opportunity to put his full and current circumstances to the company. In *Foster* the worker complied with a program of alternative duties, but in *Ashlin v Forestry of Tasmania*<sup>56</sup> a worker who when placed on alternative duties under a rehabilitation and return to work program, failed to adhere to the program and undertook heavy work was lawfully terminated from his employment for this breach.

Where a worker is terminated contrary to law the worker may seek reinstatement. The question arises as to whether this is appropriate in circumstances where the worker has an ongoing incapacity for work albeit of a partial nature. Such was the case in *Smith and Kimball and others v Moore Paragon Australia Ltd*<sup>57</sup>. In *Smith and Kimball* it was found that a number of workers had been made redundant “on the basis of their WorkCover history or injury status”. At the time of their appeal they had been absent from work nearly three years. The employer had argued that the workers contracts had been frustrated. This argument was dealt with by the Australia

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<sup>55</sup> Emphasis added.

<sup>56</sup> [2004] PR 942579 2<sup>nd</sup> April 2004.

<sup>57</sup> [2004] PR 942856 20<sup>th</sup> January 2004.

Industrial Relations Commission in *Smith and Kimball* noting the authority of *Finch v Sayers* and *Foster* (above) as well as *Pasovska* and adopting the approach “that there was relatively little room for the operation of the doctrine of frustration due to illness.” The workers were reinstated with orders that the employer make available the position that the workers were employed in prior to their dismissal or another position on terms on conditions no less favourable. Interestingly whilst apparently adopting *Finch v Sayers* the Commission noted (at para 44):

*However, under the general law an employer may lawfully terminate, or perhaps treat as frustrated, the contract of employment of an employee who, by reason of illness or injury, does not have an ongoing capacity to perform duties of the position in which he or she is employed. Hence the need for provisions in workers compensation legislation protecting an injured employee for a period following the injury and a provision such as s 170CK (2) in the Workplace Relations Act 1996. However, ongoing incapacity arising from illness or injury can certainly be a valid reason for termination of employment within the meaning of s 170CG (3) (a).*

The Commission in *Smith and Kimball* did in fact note that reinstatement was to the substantive contractual position occupied by the applicants at the time of termination but also noted that this included modified duties within that position. The effect of the combination of *Foster* and *Smith and Kimball* seems to be that an employer has little prospect of arguing successfully that a worker, who at the time of dismissal is performing alternative duties, should be held to have had their contract terminated by operation of the doctrine of frustration. A worker undertaking modified duties may be held to be operating under a new varied contract or alternatively a position within the range of duties within the substantive contractual position. Only when the workers is totally incapacitated for work might the doctrine of frustration have any currency, but on the authority of *Pasovska* an employer would be best advised not to rely on the doctrine of frustration but to terminate the employment by giving notice. Even at the point of giving notice and employer would according to *Foster* need to ensure that they were acting on current medical information. A final word on this area relates to the overriding duty trust and confidence in dealing with injured workers. In *Carrigan v Darwin City Council*<sup>58</sup> von Doussa J considered an unfair dismissal application under the *Industrial Relations Act 1988*(Cth) brought following a resignation by an employee who alleged that she was not provided with suitable duties whilst undergoing a rehabilitation program.

It was alleged by the employee that she had been dismissed contrary to section 75A of the *Work Health Act* (NT) which provides that;

*An employer liable under this Part to compensate an injured worker shall -*

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<sup>58</sup> Print 970101 20 March 1997.

(a) *take all reasonable steps to provide the injured worker with suitable employment or, if unable to do so, to find suitable employment with another employer; and*

(b) *so far as is practicable, participate in efforts to retrain the worker.*

Von Doussa J was not prepared to incorporate into the worker's contract of employment a term that would reinforce this statutory obligation, despite the contract making reference to the need for the employer to comply with statutory requirements. This term was considered a "motherhood statement" not strong enough to support the incorporation of the return to work provisions. Likewise, it was not considered appropriate to imply section 75A into the contract of employment.<sup>59</sup> If the worker had been successful in regard to the latter two submissions there is no doubt that the Court would have had to consider the effect of not providing suitable work for the worker whilst she was attempting a rehabilitation program. However, von Doussa J found that the employer had been in breach of an implied term as to trust and confidence.<sup>60</sup>

Von Doussa J then went on to find that the employer had failed to provide the employee with suitable duties intending to make her work so difficult that she would resign, as in fact she did. Her resignation was not voluntary. The circumstances of the termination of employment constituted a constructive dismissal.<sup>61</sup> Having established that the termination was at the initiative of the employer, Von Doussa J held that the employer's conduct amounted to a breach of the implied term as to trust and confidence. He said (at 7):

*Whilst I have held that the rehabilitation provisions of the Work Health Act do not operate as contractual provisions between the parties, I consider that Ms Carrigan is correct in her submission that a failure on the part of the Council to fulfill its rehabilitation obligations under the Work Health Act could amount to conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*

Later he found (at 19):

*I find that the respondent was not serious about full rehabilitation of the applicant. I find this because initially the respondent took little or no interest in finding suitable alternative duties for the applicant or for putting a long-term rehabilitation program together. This is evident also in the queries by Mr. Morgan concerning paying the applicant a lump sum.*

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<sup>59</sup> Following *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 where the High Court held that award provisions do not automatically become incorporated or implied into a contract of employment. Although arguably *Byrne* does not apply as here the question was whether an Act of Parliament should have been implied into the contract – given the usual prohibition on contracting out of such legislation it is surprising von Doussa J came to the view that the provisions were not implied into the contract.

<sup>60</sup> Applying *Woods v WM Car Services (Peterborough) Limited* [1982] ICR 693.

<sup>61</sup> This concept is discussed in detail in *A.A. Russian v Woolworths (SA) Pty Ltd* [1995] SAIRC 59 and *Mohazab v Dick Smith Electronics* (1995) 62 IR 200.

Von Doussa J found the applicant's termination was unfair and awarded the maximum (6 months wages) compensation.<sup>62</sup> Thus whilst section 75A of the *Work Health Act* (NT) did not protect the employee from dismissal directly, it did provide a backdrop against which the employers conduct could be measured for the purposes of assessing the employers good faith in attempting to facilitate rehabilitation.

As has been noted in the various judgments referred to above in addition to the requirement to provide suitable duties for the purpose of rehabilitation, injured workers have their employment protected to a degree by provisions which prevent employers terminating workers within prescribed time periods following an injury. In some States, for example, South Australia, there is an also a provision that the employer must notify the regulatory authority (WorkCover) of an intention to terminate and give 28 days notice of that intention.<sup>63</sup> Most frequently the authorisation for the employer to terminate the worker turns on the issue of whether the employer is able to provide suitable duties for the worker. Where an employer is able to terminate the worker, the issue of frustration does not arise. Where the employer is required by the regulatory authority to be more innovative and resourceful in providing alternative duties (as the worker is unable to perform the pre-injury duties at all), the question of frustration could arise in a manner discussed above.

On the question of the interaction between termination of employment and notice provisions and the doctrine of frustration in the case of *Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch and Brisbane Transport v Brisbane Transport*<sup>64</sup> Commissioner Blades dealing with an application under the *Industrial Relations Act 1999* (Qld), noted;

*However, there are protections to be found in the (WorkCover) Act in relation to the dismissal of injured workers. Those protections are set out in Part 5 – Protection of Injured Employees, where s. 93 prohibits a dismissal within 6 months after an employee becomes injured. Section 95 provides further protection for an injured worker who is dismissed after 6 months of the injury. That section provides that the employee may apply to the employer, within 12 months after the injury, for reinstatement to the employee's former position. First however, the employee must give the employer a doctor's certificate that certifies the employee is fit for employment in the former position*

*...On the medical evidence available to the employer at the date of termination, it was apparent that the incapacity was of such a*

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<sup>62</sup> The acceptance by von Doussa J of the employers duty of trust and confidence is supported by a decision of the Full Bench of the Industrial Relations Court of Australia (of which he was a member) in *Burazin v Blacktown City Guardian Pty Limited* (1996) 142 ALR 144 at 151. See also *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 and the discussions in Naughton R 'The Implied Obligation of Mutual Trust and Confidence – A new Cause of Action for Employees?' (1997) 10 *Australian Journal of Labour Law* 287 which discusses *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] 3 WLR 95 and Spry M Damages for Mental Distress and the Implied contractual Term of Confidence and Trust (1997) 10 *Australian Journal of Labour Law* 292.

<sup>63</sup> Section 58B of the *Workers Rehabilitation and Compensation Act 1986* (SA).

<sup>64</sup> [2003] QIRComm 299 (9 May 2003); 173 QGIG 282.

*nature and was likely to continue for such a period that performance of his obligations in the future would be either impossible or something radically different from bus operating and the 3 September certificate further confirmed this opinion.*

*Although probably entitled to regard the contract as being frustrated, the employer instead elected to terminate the contract on the basis of the applicant's incapacity.*

It is interesting that Commissioner Blades (who cited *Finch v Sayers*) entertained the possibility of frustration of the contract of employment. The facts of this case were that the worker was injured in February 2002 and as at August 2002 he was unable to return to work. His employer gave him notice and on that basis the worker applied to the Commission to assert that the dismissal was unfair. As at the time of hearing in April 2003 the worker had not been certified fit to return to work and had been paid compensation up until that month. In the end result frustration of contract was not in issue as the Commissioner held that the worker had been dismissed in accordance with the governing enterprise agreement and that such dismissal was not contrary to the *WorkCover Queensland Act 1996* (Qld). From this case it is also possible to glean that the workers compensation provisions which provide for return to work and rehabilitation will be a relevant consideration in determining termination of employment issues. It is noteworthy that these provisions were not referred to in *Pasovska*.

### ***Implied Terms and Frustration of Contract***

In *Finch v. Sayers* the executive worker's contract of employment did not contain any express terms relating to the issues of illness and incapacity. The worker's salary was fixed and his duties defined but the contract was otherwise silent as to the terms and conditions of employment. Wootten J had observed in *Finch v Sayers* that terms could be implied into a contract of employment having regard to contemporary standards. In *H & H Security Pty Ltd v Toliopolous*<sup>65</sup> the question of what sick leave if any could be implied into a contract of employment for a managerial employee arose. Madgwick J said;

*In classical legal theory, a question might arise as to whether the performance of the initial contract had been frustrated, although I think there is much to be said for the view espoused by Wootten J in *Finch v Sayers* (1976) 2 NSWLR 540, that in most areas of employment in modern Australia there is relatively little room for the operation of the doctrine of frustration due to illness. I should mention the analogical influence of the provision in England and at least three of the Australian jurisdictions of legislation for frustrated contracts generally, which aims to adjust the rights and liabilities of the parties on something fairer than an all or nothing basis. Section 170DF (1) (a) of the Act made it unlawful to terminate an employee's employment for illness- or injury-caused temporary absence from work.*

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<sup>65</sup> [1997] 838 FCA (18th August 1997).

*There is also to be taken into account the influence of general practices as between employer and employee in Australia. For example, it is quite common when an employee's sick leave runs out, for the employer to grant pro rata annual leave which has accrued, if it is sought to be taken. It is usual in Australia for a somewhat more generous treatment to be accorded managerial employees in relation to sick leave than others. There is, however, no generous treatment generally of employees before they have contributed a lengthy period of service with one employer. Five days per annum sick leave is a standard minimum award provision and, even where express provision is made for employees in managerial and more senior areas, it is uncommon to find more than two weeks per annum provided, although this is generally able to be accumulated for later use if untaken in a given year.<sup>66</sup>*

In the end result it was held that the worker was entitled to one week's sick leave. Notably the Commission took into account legislation relevant to temporary incapacity for work. In this case the *Workplace Relations Act 1996* (Cth) was noted as it prohibits termination on the grounds of temporary incapacity, similar to the workers compensation provisions. Again the question of implied terms was raised in *Gawron v. SCI Operations Pty Ltd*<sup>67</sup> where Judicial Registrar Fleming noted;

*Mr Bingham relied on the decision of Wootten J. in Finch -v-Sayers [1976] 2 NSWLR 540. The facts of the decision are somewhat similar to this case. In that case the terms of Mr Finch's employment were deficient in express terms and it was thereby left to be deduced from the nature of his employment...*

*In my view the Enterprise Agreement can be relied upon as a guide to the Applicant's sick leave entitlements. Mr. Rosenthal said that staff would be treated more generously than award workers. On this basis the applicant would have accumulated a minimum of 70 hours sick leave per year after his first year of service. On this basis the Applicant's sick leave should still be continuing. It is the Court's view that when Mr Gawron's sick leave entitlement expires, his employment will not automatically determine. It simply means that the Respondent is no longer required to pay him.<sup>68</sup>*

As noted above a number of the above cases refer specifically to the State workers compensation provisions or federal industrial relations provisions which protect the employment of workers who have a temporary disability whether or not it is compensable. Workers compensation provisions are implied into every contract of employment where the worker is covered by that legislation. Since *Finch v Sayers* was decided the protections offered to workers who have sustained disability by State and Federal laws has considerably improved. Commissioner Beech in the Western

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<sup>66</sup> Emphasis added

<sup>67</sup> AIRC Print (950094) VI 718 of 1994

<sup>68</sup> Emphasis added

Australian Industrial Relations Commission in *Hoffman v Western Australian Aboriginal Media Association* noted this aspect<sup>69</sup> when he said;

*Even so, if the common law doctrine of frustration did apply, in my view, it is overridden by the provisions of section 84AA of the Worker's Compensation and Rehabilitation Act, 1981. I do agree, as Mr. Woodward has said, that the Commission is not the body to enforce the Workers' Compensation and Rehabilitation Act, 1981. However, I also agree that it is a provision that I can take into account in exercising my discretion. I have, on two earlier occasions, in the case of *Stockwin v. Cable Sands* a matter with which Mr. Clohessy was involved (77 WAIG 509), and in *Pacey v. Modular Masonry* (78 WAIG 1421) had occasion to consider section 84AA and I was of the opinion then, and I am of the opinion now, that section 84AA obliges an employer to hold the employee's job open for 12 months whilst the employee is in receipt of worker's compensation.*

*I am supported in that opinion by the decision of the Industrial Relations Court in *Fernandez v. Comgroup Supplies Pty Ltd*, a decision of Judicial Registrar Ritter of 11 December 1995. I only have the unreported decision. I do not have the citation of where it is reported. The relevance of that decision is that it leads me to the conclusion that section 84AA says that if somebody's absence is less than 12 months, then they are able to return to the job, and that is an indication, at least, that the length of Ms Hoffman's absence, being less than 12 months, does not allow frustration of the contract to operate.<sup>70</sup>*

Wooten J in *Finch v Sayers* was not obliged to consider the return to work provisions, as they had no application in that case.

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<sup>69</sup> [1999] WAIRC 230 (11 October 1999)  
<sup>70</sup> Emphasis added.



### ***Reconsidering Finch v Sayers.***

In *Finch v Sayers* Wootten J built his dicta around a "contemporary understanding" of modern employment that employers would safeguard positions for injured or sick workers during their recovery. The contemporary understanding of the employment relationship has altered in a number of ways since *Finch v Sayers* was decided.

First, there is a growing acceptance (and indeed statutory obligation) for employers to make provision for superannuation payments. Those payments operate as a charge against the employer and invariably include provision for payment of benefits upon the trustee being satisfied that the worker is totally incapacitated for work. This suggests that in fact the parties have contracted having regard to the entitlements under a policy of superannuation that allows a worker to retire on the grounds of ill health. It is therefore a matter that has been contemplated by the parties and is not an event that is outside the terms of the contract.<sup>71</sup> How does this affect the issue of frustration? It could be argued that as most superannuation policies provide coverage for retirement on the grounds of disability that there is not the imperative to maintain the contract of employment in the event of long-term absence.

Second, there is an increasing prevalence of limited term contracts and a rise in casual and part-time employment which suggests employer resistance to provisions which support prolonged absence from work.

Third, as noted, the almost universal inclusion of return to work provision into workers compensation legislation to promote rehabilitation and specific statutory programs focusing on rehabilitation. These provisions, which on the one hand retard the application of the doctrine of frustration, also provide a guide to what might be regarded as a period of reasonable tolerance for long-term absence. That is not to say that 12 months should be regarded as the trigger for the doctrine of frustration, but it is a factor which can be taken into account to show that the worker is unable to return to work.

Fourth, although quoted frequently as supporting the proposition that tribunals should be slow to hold that the contract of employment is frustrated<sup>72</sup> there has been mixed application of this principle with frequent findings by tribunals that in fact the continued absence of a worker due to illness does frustrate the contract of employment. An appendix surveying the application of *Finch v Sayers* over the last 20 years is attached to this paper. It shows that tribunals have in some cases cited *Finch v Sayers* as authority to support the application of frustration to an employment contract.

Fifth, it is clear from the appendix attached to this paper and from the discussion above that in fact there has frequently been a misapplication of *Finch v Sayers* and that *Pasovska* is recent example. In *Pasovska* arguably insufficient attention was paid to the adoption by Wootten J in *Finch v Sayers* of the requirement to consider a range

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<sup>71</sup> McGarry G, J (1987) 'Master and Servant - incapacitating illness of servant - frustration of employment contract'. *Australian Law Journal* 6 (1) January 35 at 36.

<sup>72</sup> See *Cachia v State Authorities Superannuation Board* (1993) 47 IR 254 for another recent example of the adoption of *Finch v Sayers*, but in that case the NSW Industrial Relations Commission observed that frustration did not apply as the worker had been paid sick leave during his absences from work.

of factors. In *Finch v Sayers* the worker was not actually absent from work for an inordinate time in comparison to many of the case detailed in the appendix below or indeed *Pasovska*. Further the medical evidence in *Finch v Sayers* did not support ongoing total incapacity – reducing the weight which might have been attached to that factor. In *Finch v Sayers* a key element was whether a term allowing for sick leave should be implied into the contract of employment. In most cases before industrial tribunals this is not a consideration. In short the dicta of Wooten J that the doctrine has little application in contemporary employment relationships needs to be considered in the context of that case, which involved consideration of the entitlements of managerial workers with a skeletal contract of employment who was absent for 9 months and who was able to return to work.

### ***Conclusions.***

Generally tribunals with jurisdiction over employment contracts have applied the doctrine of frustration in an inconsistent manner. The dictum of Wooten J has often been invoked so as to almost exclude the doctrine, although there are numerous cases where *Finch v Sayers* has been cited as authority which supports the application of the doctrine. That said; the central principle which emerges from both *Marshall* and *Finch v Sayers* is the need to weigh a number of factors when considering the application of the doctrine to employment circumstances.

*Pasovska* is important because the facts related to a long-term totally incapacitated worker who had received compensation for an extended period and had been afforded the protection of statutory return to work provisions and as such was a case where the doctrine of frustration was most likely to have application. It can easily be distinguished from *Finch v Sayers* on its facts. As has been argued the case should be viewed cautiously because the over emphasis on the failure of the employer to give notice.

*Finch v Sayers* needs reconsideration in that the work and industrial relations environment of the 1970's when that case was decided has evolved so that many of the protections such as Superannuation schemes, sick leave, anti-discrimination provisions relating to disability which were not then available are now mandated into employment contracts. Inattentive application of the dicta from *Finch v Sayers* may not serve workers well in the long term as *Pasovska* has shown the likelihood is that employers will give workers notice in order to be sure that contracts are brought to an end. Because *Pasovska* has placed the question of notice squarely in the minds of employers they will need to ensure that they allow sufficient time between the worker being unable to return to work and giving notice. The *Workplace Relations Act 1996* (Cth) is a guide to the period to allow, namely at least six months, but in the case of compensable claims the period before notice can be given will be 12 months.

This survey has also shown that in giving notice to a worker who apparently is unable to return to their pre-accident employment the employer must only act where is in possession of current medical evidence and where that medical evidence has been made available for comment to the worker. The cases lend very little support to employers who attempt to terminate the employment of workers in alternative duties

if those duties are being adequately performed. It follows that whilst *Pasovska* may have been a victory for one worker it may be a prompt for employers to act with less sympathy towards injured workers, but at the same time, employers who act with haste in giving notice to injured workers may not avoid litigation.

## Appendix

### Summary of recently decided case where frustration of the contract of employment was raised.

Case name	Application	Period absent from work	Injury type – whether work related	Other factors	<i>Finch v Sayers</i> cited and/or applied	Result
<i>Trigger v Australian Telecom Commission</i> [1984] 4 FCR 242	Unfair dismissal	Numerous periods of late attendance (90 days in 2 years)	Non-work related schizophrenia	Complicated work circumstances – mixed poor behaviour and performance	Yes – with other major authorities. <i>Finch v Sayers</i> cited to support frustration of contract.	Held that the contract was frustrated as the worker has not capable of performing the work
<i>Filsell v District Council of Barossa</i> [1992] SAIR 102	Unfair dismissal	Extensive periods of sick leave taken between October 1989 and February 1991	Non-work related	Weekly employee who had exhausted sick leave	No – but reference to <i>Marshall v Harland and Wolff</i>	Held employer was entitled to give notice – implicit that the worker could not perform the work – satisfied <i>Marshall v Harland and Wolff</i>
<i>Horberry v Yakaki Australia Pty Ltd (SA) Operations</i> [1994] SAIRC 9	Redundancy payments and underpayment of wages	Absent from work for 6 months in 1989 and then totally unfit for work after March 1990 – three years. Given notice in June 1991.	Work Injury	Reference to section 58b (3) of the <i>Workers Rehabilitation and Compensation Act 1986</i> (SA) – which requires the employer to give notice of termination.	No	Held – inter alia that the contract had been frustrated at the time of the decision in 1994.

<b><i>Grout v Gunnedah Shire Council</i></b> (9400410) 30 <sup>th</sup> September 1994	Unfair dismissal	Developed stress condition in May 1994 resigned within a week of diagnosis	Work related Stress	Short period of incapacity – no real consideration of frustration – main issue was question of resignation	Yes together with <i>Simmonds v Hay</i> and an observation that there was a different approach to the issue of frustration.	Not frustration – <i>Finch v Sayers</i> noted and interpreted as allowing termination if the worker is unable to return to work following expiry of sick leave expressly or impliedly provided for in the contract.
<b><i>Fuller v Botany Cranes and Forklift Services Pty Limited</i></b> (950141) 7 <sup>th</sup> April 1995	Payment in lieu of notice	From August 1994 following injury the worker was permanently totally incapacitated – paid workers compensation for total incapacity	Work Injury	Held that no payment due in any event as the worker was still in receipt of workers compensation at the time of hearing.	No	Held although frustration not referred to, that the contract came to an end because the employee could not return to work – not at the initiative of the employer.
<b><i>Sirous v The Executive Director, Homeswest</i></b>	Unfair dismissal	Commenced in the public service in 1985 – became ill in May 1992 and was absent until dismissal in December 1994	Non-work related	Long term employee	Yes – heavy reliance also on <i>Marshall v Harland and Wolff</i> .	Held contract not frustrated due to expectations of continuing employment created by superannuation scheme, cumulative sick leave and sick leave without pay.

<b><i>Durham v WAGR</i></b> [1995] WAIR 56	Unfair dismissal	Injured in 1989 – returned to work on lighter duties until July 1992 – then off work completely thereafter – dismissed in July 1993	Work Injury.	The issue at trial was whether the termination had been consensual – the worker claiming that it was not – as he had been forced to resign in order to receive a damages award.	Yes – with detailed analysis of other authorities	Held – as there was evidence that the employer would have continued rehabilitation had there not been consensual termination – and that the worker had some capacity to work – hence the contract was not frustrated.
<b><i>Taleviski v RJ Gilbertson Proprietary Limited</i></b> (960273) 31 May 1996	Unfair dismissal	Long absence from work – placed on light duties – very restricted. On light duties for extended period. Positions description differed from original contract.	Work injuries	Not a claim of frustration – but implicit in judgment that worker could not perform contractual obligations.	No	Held employer entitled to terminate by notice on grounds that worker no longer about to perform <i>inherent requirements</i> of the particular position.
<b><i>Hardie v PT &amp; BD Slade</i></b> [1996] WAIR 33	Unfair dismissal	Possibly only several months	Work Injury	Short-term employment . Worker not declared fit at time employer required his service for seasonal work	No	Held contract ended by frustration

<p><b><i>Mitchell v Macquarie Health Service</i></b> (960166) 4<sup>th</sup> March 1996.</p>	<p>Unfair dismissal</p>	<p>Off from November 1993 until January 1994 – due to back injury returned to work on light duties only, further injury in 1995 returned on light duties – then off on stress related condition in May 1995. – Terminated in August 1995.</p>	<p>Work Injury.</p>	<p>Terminated on grounds that worker (nurse) could not return to full duties.</p>	<p>No</p>	<p>Held termination unfair as worker (although supernumerary) was capable of performing a range of duties which the employer could offer -</p>
<p><b><i>Dean v Moore Paragon Australia Limited</i></b> (1577/96 Print N6866) 6<sup>th</sup> December 1996</p>	<p>Unlawful termination on grounds of disability</p>	<p>Injury to back in 1989 – medical review in 1994 found worker unfit for pre-accident work. Company restructure in March 1995. The worker was dismissed in May 1996.</p>	<p>Work Injury</p>	<p>Dismissed on the grounds that he could not perform the inherent requirements of his position.</p>	<p>No</p>	<p>Dismissal confirmed as justified.</p>

<b><i>Edwards v Bulga Coal Management Pty Ltd</i></b> (970047) 14 <sup>th</sup> February 1997	Unfair dismissal	The applicant had operations to his hand in 1987, 1990, 1993 and 1993 and various periods of incapacity during those times. He did not work from December 1994 until termination in January 1996.	Work injury	Worker had agreed to go onto workers compensation payments – his position as a storeman could not be modified and he was not fit for other work	No but other authorities relating to termination where worker could not perform the inherent requirements of the position.	Held that dismissal was unfair procedurally (harsh form of notice) – that the worker could not perform the inherent requirements of the particular position, namely a storeman.
<b><i>Bye v Longford Meat Company H</i></b> Print P1351 (28 <sup>th</sup> May 1997)	Redundancy claim	Regarded as a long-term absentee – worker unable to perform any duties at time of sale of business.	Work Injury	Transmission of business – claim of continuing employment attempted	No	Similar to <b><i>Taleviski v RJ Gilbertson Proprietary Limited</i></b> - finding that the employer was entitled to terminate long-term absentees.
<b><i>H &amp; H Security Pty Ltd v James Toliopoulos</i></b> [1997] 838 FCA	Unfair dismissal	Not specified in the judgment	Not specified	Appears that the matter did not relate to the issue of frustration	Yes	<b><i>Finch v Sayers</i></b> referred to in the context of implied terms and appropriateness of implying a term of sick leave into a contract of employment.
<b><i>Edlington v Templeton Constructions</i></b> [1998] SAIRC 5	Long Service Leave	First injured in 1986 and again in 1988 and did not return to work after 1988.	Work injury	Workers compensation redeemed in 1996. Worker had resigned in 1991.	No	Held resignation ended contract – but noted that in any event the contract was frustrated at the time when he could no longer



						perform work.
<b><i>Ratnayake v Sir Charles Gardiner Hospital</i></b>	Unfair dismissal	Off for various periods between January 1996 and August 1997 when dismissed	Work Injury	Employed as a cleaner – not able to return to that position although fit for alternative duties.	Yes but distinguished on the facts.	Held contract of employment as a cleaner was frustrated. Employer entitled to terminate contract for other duties by giving notice.
<b><i>Innisfail District Hospital Service v Mitchell</i></b> [1999] QIR 69	Retirement on grounds of ill health under <b><i>Health Services Act 1991</i></b> (Qld)	Unfit as a nurse from January 1997 until date of hearing in 1999.	Not work related – worker took sick leave.	Small hospital unable to offer alternative duties.	No – but other authorities referred to.	Held contract of employment was frustrated.
<b><i>Notification under s130 (Archard's case)</i></b> [1999] NSWIR 452	Unfair dismissal	Injured in February 1997 and April 1997 – off until May 1997 and then returned on light duties thereafter.	Work injury	Did not return to full duties – dismissed whilst continued under rehabilitation.	No – <b><i>Mitchell v Macquarie Health Service</i></b> noted.	Held – contract for position as Maintenance Fitter although fit to do alternative duties no order for reinstatement made as an unreasonable impost on the employer.
<b><i>Al-Shennag v Bankstown City Council Civic Services Group</i></b> [2000] NSWIR 1115	Unfair dismissal	Absent from May 1996 to December 1996 and then from June 1999 to May 2000 when employer terminated the contract on grounds of frustration.	Disputed workers compensation claim	Worker failed to properly attend rehabilitation, complicated medical condition and allegations of harassment not made out.	No	Held –that employer was entitled to treat contract of employment as at an end due to frustration.

<b><i>Walsh v The Police Association</i></b> [2000] VSC 292	Unfair dismissal – injunction to prevent termination.	Absent from November 1998 until hearing – 17 months	Probably not – worker was diagnosed with chronic fatigue syndrome	Unusual nature of application – it related to an application to prevent Union from dismissing him.	No – but other authorities noted – court recognised that frustration could occur.	Held – interim injunction was granted to prevent dismissal – on grounds that an arguable case existed to show Unions resolution to dismiss the worker was unlawful
<b><i>Wilkinson v Total Peripherals Pty Ltd</i></b> [2000] NSWIR 1057	Unfair dismissal	At least 21 days during probationary period. Likely to unfit beyond probationary period.	Not work related –	Probationary employee - took leave at time of illness – requested extended leave of 3-4 months, not granted	No	Claim dismissed – curiously held that termination against the wishes of the worker occurred by reason of illness was a dismissal. Dismissal was not unfair.
<b><i>Launceston Linen Service Pty Limited v Hawksley T</i></b> 9569 and T 9577 25 <sup>th</sup> September 2001	Unfair dismissal	Several injuries between 1996-2001 with periods off work – but return to work on light duties at the time of dismissal.	Various work related injuries to the arms and shoulders .	Employee had not used all of sick leave entitlements at time of dismissal. Argument centered around whether the light duties was a radical departure from contracted work- Held not to be – no precise contract or position description	Yes	Held contract was not frustrated – dismissal had been unfair procedurally (harsh form of notice). Variation in duties fell with the range contemplated by the original contract. Note reference to <b><i>Taleviski v Gilbertson</i></b> (above)

<p><b>Hilton Hotels of Australia v Pasovska</b> [2003] NSWIR 17</p>	<p>Claim for long service and annual leave</p>	<p>Various work injuries 1988 and 1989 – ceased work in 1993 and declared totally unfit for work in 1995.</p>	<p>Work Injuries</p>	<p>Worker made no contact with employer following declaration of total incapacity in 1995 then claimed long service and annual leave in 2000.</p>	<p>Yes referred to in detail</p>	<p>Contract held not to be frustrated – despite evidence that worker was not able to work.</p>
<p><b>Artbi v Brisbane Transport</b> [2003] QIR 299</p>	<p>Unfair dismissal</p>	<p>Injury to back in MVA in February 2002 – totally unfit for work – dismissed in August 2002</p>	<p>Work Injury – paid workers compensation until April 2003</p>	<p>Worker reviewed in August 2002 – found not fit to return to work with probability he could not return in the future. <b>WorkCover Queensland Act 1996</b> considered, as it required the employer to give worker notice of intention to dismiss.</p>	<p>Yes as well as <i>Marshall v Harland and Wolff</i></p>	<p>The employer had given the worker notice – this was not contrary to the <b>WorkCover Queensland Act 1996</b> – but it was noted that the employer was entitled to regard the contract at an end through frustration.</p>
<p><b>Tucker v McAllery Family Holdings Pty Ltd</b> [2004] SAIRC 10</p>	<p>Long Service Leave</p>	<p>Critical question was the period from May 1999 April 2000- 11 months – the applicant was unable to return to work – transmission of employment.</p>	<p>Non work related injury</p>	<p>Claim for Long service leave was premised on the applicant being employed after April 2000 – employee was permanently employed for 6 years prior to accident. No notice of termination given to employee.</p>	<p>Yes.</p>	<p>Held contract was on foot after May 2000 – 11 months after accident. Sufficient to establish claim for LSL against original employer.</p>

<p><b><i>Smith and Kimball v Moore Paragon Australia Ltd</i></b> PR 942856 20<sup>th</sup> January 2004</p>	<p>Unlawful termination</p>	<p>The applicants had various periods of incapacity and were paid workers compensation</p>	<p>Work Injuries</p>	<p>Employer restructured the business and made the applicants redundant</p>	<p>Yes – (along with other authorities) and followed</p>	<p>Frustration was not made out and workers were reinstated on the grounds they were fit for light work. Noted that employers acted unfairly in assuming a state of incapacity which was not proven on current evidence.</p>
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