

Article Information

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Federal Court says “bullied” employee can’t have her cake and eat it too

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John Evans, Lawyer, discusses the decision and the timely reminder for employers to ensure their workplace policies are updated.

Background

The [Full Court’s decision](#) is the latest (and potentially final) in a long list of decisions based on issues arising in 2011 aboard the ship named the *Far Swan* operated by the respondent, **Farstad** Shipping. During late 2011 on board the *Far Swan*, the appellant, **Ms Romero**, had a falling out with the ship’s Captain. At the time Farstad had in place workplace policies relating to bullying and sex discrimination. An investigation was held into the incidents. In a previous decision of the same bench, the Full Court held that there were deficiencies in the investigation and Farstad had therefore breached the policies which were incorporated into Ms Romero’s employment contract.

Questions of repudiation, affirmation, election and damages were remitted to be heard by a single judge, the trial judge having since retired.

Federal Court

Tracey J ([Romero v Farstad Shipping \(Indian Pacific\) Pty Ltd \(No 3\) \[2016\] FCA 1453](#)) held that the breached terms in the contract were no essential conditions capable of achieving substantial damages. While Ms Romero was entitled to damages for the breach of contract, the nature and character of the financial losses would not have been regarded as a probable consequence of Farstad’s breach. Ms Romero received nominal damages of \$100.

On repudiation, Tracey J held that whilst Ms Romero was concerned with Farstad’s treatment of the investigation (which formed the technical breach of contract), Farstad made it known it wished for Ms Romero to continue her employment and even offered different postings. There was nothing in Ms Romero’s contract (including the policies) which supported Ms Romero’s contention that if they had not been incorporated, Ms Romero would not have entered into the contract. As a result, the terms could not be considered essential terms in nature.

In terms of affirmation and election of the contract, the primary judge held that even in the event that Farstad had repudiated the contract, Ms Romero would have failed in her claim because she had failed to promptly accept any repudiation and terminate the contract. During the 22 month period between the breach of contract and Ms Romero’s purported acceptance of the alleged repudiation, Ms Romero had received sick leave payments, payments for attending medical practitioners to assess her fitness to work, superannuation and other allowances. This left the primary judge with the only option that even in the case there was repudiation by Farstad, Ms Romero had affirmed the contract.

Ms Romero had claimed damages for loss of income whilst undertaking retraining at her own initiative in legal studies (outside of the maritime industry) and the associated costs of that training. In the primary judge's eyes, if Ms Romero had remained in the maritime industry, her training towards a Master's certificate would not have been thrown away. The loss of wages during that training would not have been in vain and it would have been unnecessary for her to retrain in a different area. These were solely Ms Romero's decisions and not something that would have been contemplated as a result of breaching the contract at the time Farstad and Romero entered into it. Having suffered no substantive loss from Farstad's breach of contract, only nominal damages were awarded.

Ms Romero appealed to the Full Court on four grounds, namely that the primary judge had failed to find the contractual term breached as essential and therefore justifying her termination of the contract, and that the loss she claimed was incurred due to the breach was not too remote.

Full Federal Court

The Full Court upheld the primary judge's reasoning on all substantive issues. Not only was it likely that Ms Romero would have entered the contract even had the terms (including the investigation policy) not been in the contract, but also on the evidence before the Court, Ms Romero only became aware of the investigation policies after she was employed.

At no point did Farstad show an intention to not be bound by the contract as a whole - it had actively sought to bring Ms Romero back to work after the investigation. Indeed, even if this was not the case, the Full Court upheld the reasoning of the primary judge that by continuing to receive employment benefits and allowances during the 22 month period between the investigation and the purported acceptance of repudiation, Ms Romero had failed to promptly accept any repudiation and terminate the contract.

The breach of contract was in no way serious enough to justify termination of the contract by Ms Romero. The deficiencies in the investigation did not lead to any adverse findings against Ms Romero and did not threaten the continuity of Ms Romero's employment with Farstad. During the same period Farstad undertook steps to facilitate Ms Romero's return to work.

In relation to the assessment of damages for Farstad's breach of contract, the Full Court focussed on Ms Romero's continuation of her claim for breach of contract after having entered into a settlement agreement with Farstad for \$580,000 as part of a separate claim before the Administrative Appeals Tribunal in which she alleged an injury. In settling this workers compensation portion of the dispute, the deed recognised that Ms Romero had developed a health condition and as a result could no longer work in the maritime industry. The Full Court held that Ms Romero could not now claim damages because she had been compensated for her inability to work by reason of her injury. Damages for loss of future earnings would require acceptance of a "false premise" that she was not injured and capable to work.

In relation to the damages in relation to a complete change of career, the Full Court upheld the primary judge's reasons that this was neither the natural and probable consequence of the breaches of the policy nor within the reasonable contemplation of the parties as the probably result of the breaches when they entered into the contract.

Lessons for employers

Employers will take comfort in knowing that the Full Court will not easily grant employees 'two bites at the cherry' in not allowing an employee to be awarded substantial damages for injury when simultaneously being awarded money for loss of future earnings.

The *Romero v Farstad* set of decisions are a timely reminder for employers to ensure that their workplace policies are up to date and steps are taken to ensure they do not form part of their employees' contracts. Maintaining workplace policies outside of the employment contract allows for greater flexibility for the employer to vary policies when required.