

**CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2021 WAIRC 00093

CORAM : SENIOR COMMISSIONER S J KENNER

HEARD : FRIDAY, 27 NOVEMBER 2020, TUESDAY,
1 SEPTEMBER 2020, WEDNESDAY, 14 OCTOBER
2020, FRIDAY, 27 NOVEMBER 2020; WRITTEN
SUBMISSIONS 14 DECEMBER 2020, 18 DECEMBER
2020

DELIVERED : THURSDAY, 1 APRIL 2021

FILE NO. : B 93 OF 2020

BETWEEN : SEAN CRAIG
Applicant

AND

UNIVERSITY OF WESTERN AUSTRALIA
Respondent

Catchwords : Industrial law (WA) - contractual benefits claim - claim for
payment of remainder of contract period - alleged
constructive dismissal - diminution of duties found to be
within scope of employment contract - dismissed

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Application dismissed

Representation:

Applicant : Mr P Mullally as agent
Respondent : Ms A Cassellas of counsel

Case(s) referred to in reasons:

Brackenridge v Toyota Motor Corporation Australia Ltd (1996) 142 ALR 99

Earney v Australian Property Investment Strategic Pty Ltd [2010] VSC 621

Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313

W E Cox Toner (International) Ltd v Crook [1981] IRLR 443

Watts v Rake (1960) 108 CLR 158

Western Excavating (ECC) Ltd v Sharp (1978) 1 All ER 713

Whittaker v Unisys Australia Pty Ltd (2010) 192 IR 311

*Reasons for Decision***Background**

- 1 The applicant has a background in systems analysis and has had approximately 18 years' experience in a range of industries. He holds tertiary qualifications in marketing and business management and also has qualifications in information technology and financial modelling.
- 2 In late 2018 the applicant was approached by a senior finance executive of the respondent, Ms Richardson, to discuss a possible position with the respondent, in relation to a finance transformation program that the respondent was proposing to implement. After several discussions and meetings between the parties, an offer of employment was made by the respondent to the applicant for a position of Project Analyst, on a fixed term basis for two years from January 2019 to January 2021. A significant component of the project required the approval by the senior executive of the respondent of a business case. Because of financial constraints, this aspect of the project did not receive approval. The applicant maintained that it was the intention of his engagement he take a lead role in this project and the non-approval of this significant component of it led to a substantial reduction in the scope of his duties and responsibilities. The applicant maintained that the net effect of this was a repudiation by the respondent of the applicant's contract of employment, which ultimately led to his resignation in July 2020.
- 3 The applicant claimed that he had no alternative but to resign and maintained that he was "constructively dismissed" because of the respondent's repudiation of his contract of employment. The applicant seeks payment under the termination of employment provisions of his contract of base salary for \$90,546.15 and superannuation for \$15,392.85, being a total sum of \$105,939. The respondent contended that the applicant has no such entitlement under his contract as he voluntarily resigned from his employment. The respondent denied that the changes made to the Program led to sufficiently major alteration to his duties and responsibilities, to constitute a repudiation of his contract. The respondent relied upon the express terms, which it said enabled the respondent to allocate varied duties to the applicant or require him to perform no work, if he continued to be paid his salary and benefits under the contract.
- 4 Thus, it will be whether, on the facts, the respondent repudiated the applicant's contract of employment. As well as an examination of the factual circumstances as contended by the parties, relevant too will be the terms of the applicant's contract, either express or to be implied, as to whether they contemplated changes of duties of the kind contended.

The appointment of the applicant

- 5 The applicant testified that at the end of 2018 he was contacted by email by Ms Richardson, the Associate Director Financial Projects of the respondent about a possible position at the respondent. The applicant used to work with Ms Richardson at the respondent some years earlier. The email (exhibit A1) referred to a “Finance Transformation” project at a high level, and set out in broad terms, what was in contemplation. The email referred to a “multi-year program of work” requiring a team of people with diverse skills and experience. Ms Richardson, knowing the applicant and his background and experience, asked if he may be interested in a position.
- 6 A short time later on 6 December 2018, the applicant met with Ms Richardson and also the then Chief Financial Officer, Mr Cowper. The applicant viewed a presentation setting out an outline of the Program, that was ultimately designed to improve the delivery of professional services at the respondent, in the areas of finance, procurement and human resource management. It also sought to save costs. Ms Richardson in her evidence, confirmed that she contacted the applicant to see if he would be interested in working for the respondent on the Program. The applicant testified that he asked if the funding for the Program had been secured and he said that Ms Richardson informed him it had been “pre-approved”. This was not denied by Ms Richardson although she said this covered the initial stages of it and not the entire Program itself. Ms Richardson also testified that she intended that the applicant would have a leadership role.
- 7 These discussions led to an offer of employment to the applicant as a Program Analyst. A copy of the position description for the applicant’s job was exhibit A2. Under the heading “Role” the Program was described as “a step change in the service provision and efficiency of the University’s finance function”. Consistent with Ms Richardson’s evidence, the reference to the applicant’s position having a “key role” and a “lead role” in aspects of the work to be performed, was confirmed in the position description. A contract of employment was entered into between the parties, tendered as exhibit A4, for a fixed term of two years from January 2019 to January 2021. The applicant had a remuneration package of \$184,860 per annum, comprising a base salary of \$158,000 plus \$26,860 in superannuation. The applicant was responsible to Ms Richardson. It was a part of the applicant’s role to assist in defining the overall scope of the Program.
- 8 The applicant’s duties, were set out in Schedule 2 to the Contract and they provided:

Duties

- Provide data analytics and business process review across the Finance Function to support the Associate Director and CFO in defining the targeted Finance function including but not limited to process efficiency and automation, key governance and control, business partnering capabilities
- Provide insight to the program on identified areas of service/processes weakness or improvement including recommendations of change
- Work in partnership with external consultants and other team members in defining and achieving the Finance transformation program
- In conjunction with the Associate Director and CFO, have input into outlining the strategy and roadmap for delivery of transformation of the finance function to the require target including digital solutions to support
- As part of the roadmap have key input into assessment, consideration and recommendation on future operating models, process improvement or the application of digital technology as required. Including working with other team members to provide insight into the assessment and consideration of areas such as ERP and Performance Management Solutions, Analytics, Reporting, Dashboards, Visualisation and RPA
- Undertake a key leadership role in the implementation of assigned streams or projects within the roadmap including tracking results and outcomes as appropriate
- Lead assigned areas of the program, in the investigation and documentation of system and process issues identifying new opportunities and engaging with key stakeholders as required
- Lead role in the development and delivery of agreed projects/program of works
- Develop and maintain strategic and productive working relationships through consultation with a wide range of stakeholders to achieve objectives
- Work in collaboration with the Associate Director to ensure that program of works are integrated with other key strategic initiatives
- Provide data analytics and business process reviews to functions outside finance if required
- Undertake other tasks as directed by the Associate Director
- Other duties as directed

The Program and changes to it

- 9 The overall aim of the Program, as set out in the applicant's position description, was:

“Your role:

- (a) *The finance transformation program aims to achieve a step change in the service provision and efficiency of the University’s finance function. The outcome of the program will be to enhance finance efficiency, governance, control and business partnering capabilities.*
- (b) *As the appointee you will, in collaboration with the performance improvement team, have a key role in providing data analytics and business process review to the Associate Director and CFO to assist in defining the program of transformation, solution design and throughout implementation.*
- (c) *You will have a lead role in the implementation phase for key streams or projects within the overall program including managing stakeholders, defining requirements and ensure required outcomes are delivered.”*

- 10 The “Transformation Program” involved the examination and delivery of options for the respondent to modernise its financial and human management systems, to improve and make them more efficient. Part of the applicant’s job was to help with defining and outlining “the roadmap for delivery of the Program”. This involved movement from manual systems to a “cloud” based system.
- 11 An aspect of the Program was the “Total Accounting System Replacement”. This involved the potential replacement of the respondent’s accounting systems and tools. To progress this part of the Program, a business case had to be prepared, which involved the applicant, in mapping out the proposal and also the return on the investment to the respondent. A copy of the business case proposal was exhibit A10. It was common ground that because of financial constraints, the respondent did not approve the business case. The applicant says this was effectively the end of the Program as he saw it. He testified this aspect of the Program was its mainstay and was the reason he was recruited by Ms Richardson.
- 12 This was not the view of Ms Richardson or Ms Marquand, the respondent’s Chief Finance Officer. They testified that while the decision to not proceed with the TASR meant that it was no longer part of the Program, the scope of works involved a lot of other activities as a part of the “roadmap”. Ms Marquand anticipated that it could be a three to five year project. Ms Richardson similarly testified that the Program involved multiple workstreams, with the TASR being one aspect. She denied that she had told the applicant when the business case was not approved, that the Program had ended. Whilst the applicant referred to a text message (exhibit A11) from Ms Richardson to the applicant dated 24 December 2019, this did not indicate that the Program would not proceed. The message did have however, a tenor of disappointment and referred to “change we need to make”.

- 13 What those changes would be was the subject of discussion in a financial planning workshop held at the respondent on 31 January 2020 (see exhibit A13). The applicant gave a presentation on a management reporting project which then became his responsibility. Whilst the applicant saw this work as demeaning, both Ms Marquand and Ms Richardson said it was a very important aspect of the overall Program and the applicant did not express this view to them.
- 14 The applicant was dissatisfied because of the refusal of the business case and the outcome of the planning meeting held on 31 January 2020. On 7 February 2020, the applicant met with Ms Richardson and Ms Marquand. The applicant testified that he told them that the work now to be done was not what he had been recruited for as he was a “developer” and should not be “preparing Excel spreadsheets”. He said that he told Ms Richardson and Ms Marquand that the work to be done involved a backward step in his career. The applicant asked the respondent to pay out his contract. Whilst the applicant sent an email dated 10 February 2020 to Ms Richardson and Ms Marquand following this meeting, said to be a summary of it, they did not accept the applicant’s characterisation of the changes to the Program. Nor did they agree that the applicant’s email was an accurate summary of the meeting.
- 15 This led to a response from Ms Marquand of 19 February 2020 (exhibit A18), in which she reiterated that while aspects of the Program had been reprioritised, the applicant’s position of Program Analyst, remained key to delivering other significant aspects of it. This would continue to involve “data analytics and advice for key streams of work along with leading assigned areas of the finance transformation program”. Ms Marquand said that in terms of the applicant’s request for a pay out of his contract, that his position was still required and this would not occur.
- 16 At around this time, the applicant testified he was suffering from stress and took some time off work on sick leave. Ms Richardson testified that she knew the applicant was under considerable stress at the time and she made inquiries of the respondent’s human resources department, as to what assistance could be given to him. This led to the applicant consulting with one of the respondent’s injury management staff, Ms Bigwood. They discussed options. The applicant then said that on 21 March 2020, he received an email from Ms Bigwood (exhibit A21), in which she informed him that the respondent had approved to arrange vocational counselling for the applicant with an external consultant, to assist with job search techniques. The applicant said this surprised him. He interpreted this as an attempt by the respondent to ease him out of the respondent’s organisation.
- 17 I note, however, that before this, on 16 March 2020, the applicant had asked Ms Bigwood by email, about a discussion they had regarding “exploring the

market” and he inquired about a service to help with interview techniques, or CV writing and so on. Thus, whilst Ms Bigwood did not give evidence, and neither Ms Marquand nor Ms Richardson said they spoke with her, Ms Bigwood’s email of 21 March 2020 should be seen in this context and it did not come out of the blue.

The applicant continues in employment

- 18 Shortly after these events, the pandemic struck and the staff of the respondent worked from home. The applicant’s evidence was that he was working on relatively menial tasks from this time onwards, such as changing Excel reports and this work was not related to the Program. The applicant testified that from this time, he was assigned little work by his manager, Mr Guillaume, and he had little work to do.
- 19 The applicant referred to two emails from Mr Guillaume (exhibits A30 and A31) in May 2020, to demonstrate the work he was requested to perform over this period. Both of these emails refer to the management report documents, being the Excel spreadsheets that the applicant referred to in his evidence. The applicant testified that other than this work, he largely “sat on his hands” and waited for an indication from the respondent as to what was to be in store for him. He also said that he had no direct contact with Ms Richardson over this period and received no work to do directly from her. The applicant testified that he was also excluded from managers meetings he would have expected to attend. I note however, that the applicant was not appointed a manager as this role was undertaken by Mr Guillaume. And Ms Marquand said that such meetings normally involved directors and managers, and occasionally subject experts, as the need arose.
- 20 Over this period, both Ms Marquand and Ms Richardson said that the applicant raised no concerns with them about the work he was doing. However, Ms Richardson did say in her testimony she could not dispute the applicant’s evidence as to the work he had to perform over this time.

The applicant resigns

- 21 On 2 July 2020, without prior warning, the applicant sent Ms Richardson an email, resigning, effective immediately. The applicant said this resignation was due to “constructive dismissal”. Formal parts omitted, the email (exhibit A32) read:

I am hereby tendering my resignation, effective 2nd July 2020, due to a constructive dismissal.

When I accepted the position of a Program Analyst, it was for a specific project that of the Finance Transformation Program with the primary aim to deliver a step-change in the service provision and efficiency of the University's finance function.

In discussions leading to my start and in the subsequent work throughout the first several months, the outcome of the Finance Transformation Program was defined as – *“to redesign the Finance business processes, supported by the implementation of a single cloud-based ERP, EPM & HCM solution.”* This was exemplified with the in-depth engagement of an external solutions implementation providers (DXC) in defining this cloud-based solutions road map and requirements.

Through various correspondence prepared by yourself, Jonathan, Sylvain and the team, the continuous message has been in that Finance Transformation Programme *“would be enabled through the implementation of an integrated Financial cloud solution.”*

As we all know, the Finance Transformation Program business case did not get approved, and the implementation of a Financial integrated cloud solution (ERP, EPM & HCM) is not going ahead.

Several subsequent conversations with yourself and Jonathan (who himself identified the imposed restrictions in making strategic change for Finance as a reason for his resignation), you both acknowledged apologetically, the change of circumstances to what you both brought me in for.

This was reiterated by Leona during our last meeting (7 Feb) when she said to me, *“what had been promised and said in conversations on coming aboard and what we were bringing you back to do are not the same to where we find ourselves today.”*

With the unsuccessful Finance Transformation Program Business Case and the work now asked of me, showcases a repudiatory breach of contract, which I do not accept. Due to this breach, it is my understanding that our contract has now reached its end.

I therefore seek payment of all my entitlements, including the payment of my salary for the balance of my contract term.

With HR suggesting to seek other work opportunities and subsequently proceeding, without my consent to arrange (with business approval) for external vocational counselling, along with little to no correspondence since early March from yourself as my direct manager, I feel that I have been forced to resign. To be performing menial tasks such as building a simple excel report and in a supportive developer role over the past several months is professionally demeaning and something I can no longer accept or endure.

Please acknowledge receipt of this email as soon as possible and confirm my entitlements are being paid as above within 7 days.

- 22 Ms Richardson's evidence was that she was surprised to receive the applicant's email. She testified that she asked the applicant to reconsider and for them both to meet to discuss the matter. She replied to the applicant's email on 3 July 2020 (exhibit R1), which, formal parts omitted, was in these terms:

I regret to receive news of your resignation. You are a valued member of the Finance team and I urge you to reconsider your decision to resign.

Though we acknowledge that there has been a degree of reprioritisation of initiatives, which is not uncommon during times of change, your role as a Program Analyst remains key to delivering financial efficiencies and governance.

The responsibilities of the Program Analyst remains broadly unchanged as you will continue to provide data analytics for key streams of work.

As a result, we do not see that this is a breach of contract or as constructive dismissal.

I am keen to meet early next week to allay any concerns you may have regarding your contribution to the team and further articulate your work streams.

I have always had complete respect of your role and the work that you do. There was no intention of marginalising your contribution in any way.

I want to provide as much support as I can during this period.

A meeting invite will soon follow so we can discuss this further.

If you feel there is a need, you have the opportunity for the support through our Employee Assistance Program which you can access at any time.

- 23 Ms Richardson testified that the applicant did not wish to discuss the matter further with her and the applicant's contract terminated on 2 July 2020.

Constructive dismissal

- 24 The applicant maintains that he was "constructively dismissed" from his employment by the respondent due to the effective "shut down" of the Program in late 2019. The applicant submitted that the effective closure of the Program left him with little meaningful work to do. He maintained that this denied him a lead role as promised when he was recruited by Ms Richardson. This was said by the applicant to breach a fundamental term of his Contract.
- 25 The applicant contended that his duties and responsibilities set out in Schedule 2 to the Contract demonstrated the high level of the duties of his position. This was

evidenced, according to the applicant, by his involvement with consultants in proposing the move to a “cloud” based technology and preparing the “Finance Service Transformation Services Project” documents and the business case for the TASR.

- 26 In Sappideen, O’Grady and Riley *Macken’s Law of Employment* Eighth Edition the learned authors refer to the concept of repudiation at [8.20]:

As to what constitutes repudiation, the High Court has said:

The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party’s obligation. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it...Secondly, it may refer to any breach of contract which justifies termination by the other party...There may be cases where a failure to perform, even if not a breach of an essential term...manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arises. In contractual renunciation, actions may speak louder than words.

The test is objective. It is not necessary to prove a subjective intention to repudiate. Whether there has been a repudiation of the contract in the individual case is not a question of law but a question of fact. It is not to be inferred lightly. A refusal to perform contractual obligations, if sufficiently serious, will suffice. Similarly, misconduct of a serious nature inconsistent with the fulfilment of express or implied conditions of service will constitute repudiation. Repudiation will exist, for example, where there has been a wrongful dismissal of an employee or an employee leaves the job without notice or with insufficient notice, or where an employee has accepted an offer of employment which is then withdrawn by the employer before commencement of the employment, or where an employer reduces the wages of an employee without that employee’s consent, or a serious non-consensual intrusion on the nature of the employee’s status and responsibilities in a way which is not permitted by the contract. That is, if the employer seeks to bring about a change in the employee’s duties or place of work which is not within the scope of the express or implied terms of the contract, it may evince an intention to no longer be bound by those terms. If the employee does not agree to the change (so as to amount to a variation of the contract), he or she may claim to have been constructively dismissed...

- 27 In the specific employment context, “constructive dismissal” involves conduct of the employer constituting a repudiation of the contract of employment, in response to which, the employee resigns. Whilst a “constructive dismissal” originated from United Kingdom unfair dismissal legislation, at common law, the issue is whether the conduct of the employer constituted a repudiation of the contract, enabling the employee to accept the repudiation and terminate the contract, whilst maintaining that they were dismissed.

28 In the well-known case of *Western Excavating (ECC) Ltd v Sharp* (1978) 1 All ER 713, Lord Denning MR stated the principle of constructive dismissal as follows:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

29 The concept of repudiation, with a significant diminution in remuneration, status or responsibility in employment, has been applied in the Australian context: *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311; *Earney v Australian Property Investment Strategic Pty Ltd* [2010] VSC 621.

30 Given the concept of repudiation involves a fundamental breach of contract, it is first necessary to consider the applicant's Contract. As I have mentioned, the applicant was engaged as a Program Analyst. This was the position set out in Schedule 1 to the Contract, which specified the term of one year from 28 January 2019 to 27 January 2021. The Contract also provided in Schedule 2, the duties of the position. By cl 2 – Term of Employment, it was provided that “the Agreement supersedes and replaces any discussions, negotiations or agreements to date.”

31 The applicant grounds his claim on cl 2.3.3 in the Contract, which was in these terms:

2.3.3 Except where the Agreement is terminated in accordance with clause 2.3.1 of this Agreement or the Employee resigns under clause 12 of this Agreement, if the Employment is terminated during the Employment Period, the Employee is entitled to payment of the lesser of:

2.3.3.1 the balance of the Salary as if the Employee worked to the end of the Employment Period; or

2.3.3.2 twelve months' Salary.

32 Importantly, for present consideration, is cl 16 – Direction to Perform Different Duties or Stand Down of the Contract. Relevantly, this provided in cl 16.1.1:

16.1.1 At any time during the Employment (including for all or part of the Employee's notice period) the Employer may direct the Employee:

16.1.1.1 not to attend for work at the Location;

16.1.1.2 to attend for work at a different location to the Location;

16.1.1.3 to perform no work; or

16.1.1.4 to perform designated duties whether or not these duties form part of the Employee's usual role.

33 Finally, is cl 24 – General and cls 24.1.1 and 24.1.2 of the Contract, which provided that:

24.1.1 This Agreement contains the entire agreement between the parties with regard to the Employment.

24.1.2 All previous negotiations, understandings, representations, warranties or commitments in relation to, or in any way affecting, the subject matter of this Agreement are merged in and superseded by this Agreement and shall be of no force or effect whatsoever and no party shall be liable to any other party in respect of those matters.

34 Given these express terms, the applicant faces several difficulties. As to the reference by the applicant to commitments said to have been given to him or statements made to him by Ms Richardson before his acceptance of employment with the respondent, by cl 24.1.1 and cl 24.1.2 as above, such statements and commitments may not be relied upon by the applicant. Given the existence of such an “entire agreement” clause, it is the terms as agreed, that must be assessed, against the applicant's claim of repudiation.

35 By the Contract, the applicant's position was that of “Program Analyst”. The duties for the applicant's position, as set out in Schedule 2 to the Contract, were broad. The first dot point of the scope of duties is widely expressed. From that point, there are specific references to the “program”. I accept as pointed out by the applicant in his submissions, and as accepted by Ms Richardson in her evidence, that regarding the specific duties identified, the applicant was to play a “lead role” in relation to aspects of the work to be done. However, the list of duties specified a range of other tasks and responsibilities. These included having “input” into various aspects of work, as set out at dot points four and five. The third last dot point for example, provided for “data analytics and business process reviews to functions outside of finance”. The last two dot points are also important, enabling Ms Richardson to assign other work and the final catchall of “other duties as directed”. Thus, these duties, as defined in Schedule 2 of the

Contract, marked out the boundaries of the overall scope of work of the applicant and the rights of the respondent in relation to them.

- 36 Axiomatically, for the applicant to make good his claim of a repudiatory breach, he must establish that in relation to the changes to the Program discussed at the meeting of staff in January 2020, that the duties he was then and later required to perform, fell outside of the four corners of the Contract.
- 37 I note also, despite the breadth of the duties set out in Schedule 2, the significance of cl 16.1.1 of the Contract, set out above. This provision enabled the respondent to either assign no work to the applicant or to assign “designated” duties to the applicant, despite his “usual role”. I construe “usual role” to be the same as the “position” referred to in the Contract, which, was that of Program Analyst. This provision is broad. As long as the applicant continued to be paid and be provided the other benefits of his Contract, then the respondent had the contractual right to alter the scope of the work performed by the applicant, even assuming such work fell outside of the scope of Schedule 2, which I comment on below.
- 38 There was no suggestion that the applicant did not receive all of his other contractual entitlements in his employment. Thus, whilst the applicant maintained there was such a diminution in the scope of his duties such as to amount to a “non-consensual intrusion”, there was no reference by the applicant to these important express terms. By signing the Contract containing cl 16.1.1, the applicant agreed that not only could his duties be varied, he also could be assigned no work, as long as he continued to be paid in full. The provision in this regard, largely reflects the common law position, that an employer rarely is obliged to provide an employee with work, as long as the contractual obligation to pay remuneration is met. This is subject to certain limited exceptions, which have no application to the circumstances of this case (see generally *Macken’s Law of Employment* at [5.130]).
- 39 Thus, the applicant’s submission that the respondent had to provide the applicant with “meaningful work” cannot be sustained and is contrary to the express terms of the Contract.
- 40 Whilst in submissions the applicant referred to both *Whittaker* and *Earney* to support his contentions, both are distinguishable from the present matter. In *Whittaker*, the applicant was employed by the respondent in the role of Vice President and General Manager. His immediate superior informed him that another employee would be promoted to the Vice President and General Manager position. The applicant would move to a new and largely undefined role, focusing on negotiation and closing “mega deals”.
- 41 The Supreme Court of Victoria found that, although there was no reduction in remuneration, the applicant’s new role was a subset of the work performed by the

applicant in his former Vice President and General Manager positions. Ross J noted that in employment contracts, a significant diminution in remuneration, status or responsibility may constitute a repudiation. His Honour also noted that in *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99, the Full Court of the Federal Court found that the change of duties and classification of the employee must be “of such degree that it should be held that a new contract of employment replaced the old one”.

- 42 His Honour found that the “mega deal” position constituted a substantial diminution in status and responsibility when compared to the applicant’s former roles. Ross J considered that the removal of the applicant from the Vice President and General Manager position and the offer of the “mega deal” position, constituted a repudiation of his contract of employment. His Honour found that, by its actions, the respondent evinced a plain intention not to be bound by the existing contract.
- 43 Contrary to the situation in *Whittaker*, the applicant remained in his role as Program Analyst. Whilst perhaps the scope of his duties changed and reduced after the rejection of the business case by the respondent, the applicant was still performing duties contemplated by the scope of the Contract, including the capacity of the respondent to not assign any work at all to the applicant.
- 44 In *Earney*, the applicant was employed by the defendant company as the Chief Financial Officer when another company acquired control of 92% of the issued shares. The applicant’s position as Chief Financial Officer was one of significant status and responsibility, as the defendant was the manager of eleven funds in Australia, Asia and the United States of America, with a total amount invested exceeding \$1 billion.
- 45 The applicant contended that his employment was terminated because he was removed from his position as Chief Financial Officer and was not offered, or appointed to, another position of equal status and responsibility. The applicant contended the defendant’s conduct amounted to a repudiation of the employment contract, which he accepted in the relevant period.
- 46 The defendant denied repudiation and contended that the applicant acquiesced in his removal as Chief Financial Officer. It contended that the details of an alternative position, or positions of equivalent status and responsibility, were being discussed between the parties in good faith when the applicant purported to accept the alleged repudiation.
- 47 Hargrave J found that, during the four months following the takeover, the applicant received no proposal or offer of continuing employment and his authority to approve expenditure was substantially reduced. Although he remained Chief Financial Officer, his management responsibilities were re-

allocated, he was not notified of board meetings despite being the co-company secretary and he was removed as a signatory of the defendant's bank account, without notice.

- 48 Hargrave J also noted that while the applicant tried to propose possible alternative roles, there was not one written proposal or direction from the defendant in relation to the applicant's continuing roles. The only written statements by the defendant as to the applicant's continuing role, were those which reduced his status and responsibility as an employee. His Honour found that the applicant's status and responsibility was progressively downgraded, culminating in his removal as Chief Financial Officer. The Court found that the defendant's conduct was such to convey to a reasonable person in the applicant's position, that it did not intend to perform its obligations to employ him as either Chief Financial Officer or, in an acceptable alternative position of equivalent status and responsibility.
- 49 Contrary to the circumstances in *Earney*, despite suggesting that the offer of assistance from Ms Bigwood constituted evidence of the respondent attempting to ease the applicant out of the respondent's service, there was no evidence before the Commission to lead to the conclusion that in the mind of a reasonable person, the respondent did not intend to continue to employ the applicant in his position. On the evidence, the opposite was conveyed twice. First, it occurred when the applicant proposed a payout of the Contract in February 2020 when he met Ms Richardson and Ms Marquand. Second, it occurred when the applicant was asked, when he resigned, to reconsider, as the respondent regarded the position he held as ongoing, with other work in the overall Program remaining to be done.
- 50 Having regard to the above matters, the change in the Program, although no doubt disappointing for the applicant, did not breach his Contract with the respondent. And given the breadth of the scope of the duties set out in Schedule 2 to the Contract, I am also not persuaded that the applicant's work performed until his resignation in July 2020, fell outside of the duties set as incorporated into Schedule 2.
- 51 I do not accept that failing to gain approval for the TASR, meant the Program was at an end. It was no doubt a blow. I also accept that Ms Richardson did convey her disappointment to the applicant, that this aspect of the Program would not go ahead. However, I do not accept that the remaining work to be given to the applicant and others in the team was simply menial. Whilst the applicant referred to preparing an Excel spreadsheet, on the evidence of Ms Marquand this was the first step in the management reporting tool stream of the overall works, which the respondent regarded as important. There was also other work to be

done in relation to financial modelling, about enrolments that the applicant was asked to assist with.

- 52 That meaningful work had to be done in relation to these matters, is evidenced by the fact that the work had to be reallocated to other staff after the applicant resigned.

Delay

- 53 A matter of some significance also arises, in relation to delay. On the applicant's case, it was suggested that the repudiation of the Contract took place in January or February 2020. This was said to have occurred after the business case for the TASR was not accepted and there was some redefinition of the Program. The applicant said that his continuation in employment until his resignation in July 2020, should not be seen as acceptance of the purported repudiation of the Contract, because he was waiting to see how his skills would be utilised by the respondent, as time went on.
- 54 Faced with a repudiatory breach of contract, the innocent party has the option of either electing to affirm the contract and to treat it as continuing, or to accept the repudiation and bring the contract to an end. In an employment context, these principles were discussed by the United Kingdom Employment Appeal Tribunal in *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443, where Brown-Wilkinson J, said at 446:

It is accepted by both sides (as we think rightly) that the general principles of the law of contract apply to this case, subject to such modifications as are appropriate to take account of the factors which distinguish contracts of employment from other contracts. Although we were not referred to cases outside the field of employment law, our own researches have led us to the view that the general principles applicable to a repudiation of contract are as follows. If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v Robles* (1969) 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to

allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: *Farnsworth Finance Facilities Ltd v Attryde* (1970) 1 WLR 1053.

It is against this background that one has to read the short summary of the law given by Lord Denning MR in the *Western Excavating* case. The passage ‘moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged’ is not, and was intended to be, a comprehensive statement of the whole law. As it seems to us, Lord Denning was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (ie, further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great: see *Saunders v Paladin Coachworks Ltd* (1968) 3 ITR 51. Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay: see *Bashir v Brillo Manufacturing Company* [1979] IRLR 295.

Although we were not referred to the case, we think Lord Denning’s remarks in the *Western Excavating* case are a reflection of the earlier decision of the Court of Appeal in *Marriott v Oxford Co-operative Society* (1970) 1 QB 196. In that case, the employer repudiated the contract by seeking to change the status of the employee and to reduce his wages. The employee protested at this conduct but continued to work and receive payment at the reduced rate of pay for a further month, during which he was looking for other employment. The Court of Appeal (of which Lord Denning was a member) held that he had not thereby lost his right to claim that he was dismissed (in the *Western Excavating* case at p.30 Lord Denning explains that the case would now be treated as one of constructive dismissal). This decision to our mind establishes that, provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job.

- 55 I respectfully adopt the above approach.
- 56 Thus, if an employee, confronted with what may be regarded as a repudiation of a contract of employment by an employer, registers their protest and non-acceptance, and remains in employment for a short period to, for example, seek another job, they should not generally be regarded as having accepted the employer’s repudiation and affirmed the contract.
- 57 On the facts, the applicant expressed his unhappiness to Ms Richardson about the changes to the Program, which led to his request for a payout of his Contract or his redeployment. This was discussed at a meeting in February 2020 with Ms Richardson and Ms Marquand. It was followed by a response to the

applicant's request in an email of 19 February 2020 from Ms Marquand (see exhibit A18), that the Program was continuing and that his position of Program Analyst was still required.

- 58 The applicant continued in his position, albeit not happily it seems, and performed work assigned to him. But nothing on the evidence suggested that the applicant told either Ms Richardson or Ms Marquand, after February 2020, that he regarded the respondent's actions as a breach of his Contract. Nor did he say, orally or in writing, that he disputed the changes to his employment arrangements and that he was reserving his position. The evidence was that the applicant did not communicate his dissatisfaction with his assigned work to Ms Richardson or Ms Marquand after their meeting in early February 2020, until he resigned almost five months later, in early July 2020.
- 59 In these circumstances, especially as the applicant continued to be provided his full entitlements under his Contract throughout this time, even if there was a repudiation, which I do not think there was, it would be open to conclude that the applicant affirmed the Contract and lost his right to regard himself as dismissed, to attract the termination of employment provisions in cl 2.3.3 of the Contract.

Conclusion

- 60 The applicant was disappointed that his position with the respondent did not eventuate as he envisaged it. However, I am not persuaded that the changes to the Program meant that the respondent was in breach of the applicant's Contract, such as to entitle him to terminate his employment, with the conclusion he was constructively dismissed by the respondent.
- 61 The application therefore must be dismissed.