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**VULNERABILITY IN THE FAIR WORK-PLACE:
WHY UNFAIR DISMISSAL LAWS FAIL TO
ADEQUATELY PROTECT LABOUR-HIRE
EMPLOYEES IN AUSTRALIA**

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Vulnerability in the Fair Work-Place: Why unfair dismissal laws fail to adequately protect labour-hire employees in Australia

Trina Malone

Labour-hire employees (LHEs) do not have effective recourse to unfair dismissal laws against their employers where they have lost access to their livelihood in circumstances that are substantively or procedurally unfair. This paper provides a critique of tribunal decisions relating to unfair dismissals against employer labour-hire firms (LHFs). Such decisions highlight three key problems for LHEs in establishing each component of the definition of an unfair dismissal. First, a termination of a host assignment will not necessarily constitute a termination of the employment relationship with the LHF. Second, the host's reasons for the termination of the assignment are considered to be largely irrelevant, even if unfair. And third, tribunals are willing to accept a low standard of procedural fairness where the contractual arrangements between the LHF and the host do not provide for the implementation of a fair dismissal procedure. The paper concludes that LHEs who have lost their livelihood in unfair circumstances may 'slip' through the net of legislative protection by failing to meet the definition of an 'unfair dismissal'.

I. INTRODUCTION

... Mr Stuart worked for a labour hire company. Given that, he was involved in precarious employment being dependent on the state of the market and the whims of his employer's clients.

[G Stuart v G P R Engineering [1999] AIRC PR8479 (27 August 1999) [13] (Commissioner Raffaelli)]

Labour-hire workers are brave souls indeed. At the vanguard of the march towards 'vertical disintegration' of the workplace,¹ they are 'like trapeze artists willing to fly without the safety net' of effective legislative protection in areas such as occupational health and safety, workers' compensation and unfair dismissals.² This vulnerability largely stems from a dearth of legislation to explicitly protect labour-hire workers participating in a 'triangular' arrangement, whereby labour-hire firms (LHF) source and supply workers to a host employer.³ Rather, protective legislation generally caters for workers labouring under a traditional, bi-partite employment relationship.⁴

¹ Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353. See Section II below for an explanation of the concept of 'vertical disintegration'.

² Joellen Riley, 'A Fair Deal for the Entrepreneurial Worker? Self Employment and Independent Contracting Post Work Choices' (2006) 19 *Australian Journal of Labour Law* 246, 246; Richard Johnstone and Mark Quinlan, 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence From Australia' (September 2'005, Working Paper 38, National Research Centre for OHS Regulation) 3-4; Economic Development Committee, Joint-Committee, *Final Report: Inquiry into Labour Hire Employment in Victoria* (June 2005) 15.

³ Elsa Underhill and Malcolm Rimmer, 'State Protection for Temporary Agency Workers: Australian Developments' in Roger Blanpain (eds), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (Kluwer Law International, 2009) 173, 173-4.

⁴ *Ibid.*

Unfair dismissal laws are one such area where there is no special recognition of the unique position labour-hire workers occupy by virtue of this triangular relationship.⁵ Indeed while the *Fair Work Act 2009* (Cth)⁶ has been touted as delivering ‘protections from unfair dismissal for all employees’,⁷ no explicit legislative attention in this field is given to labour-hire workers.⁸ So, to succeed in an unfair dismissal claim, a labour-hire worker must continue to establish that an *employee-employer* relationship has been terminated at the *employer’s* initiative,⁹ and that this dismissal was ‘harsh, unjust or unreasonable’.¹⁰

Much academic literature emphasises that, in privileging an ‘employee-employer’ relationship, labour-hire workers that are *so-called* ‘independent contractors’ are often excluded from making unfair dismissal claims.¹¹ Existing literature also demonstrates the challenges of bringing unfair dismissal claims against the host employer, given that in most cases the host is not considered to be the labour-hire worker’s legal employer.¹² One less comprehensively explored area, however, is the difficulty faced by labour-hire *employees* (LHE) lodging an unfair dismissal claim against a LHF employer where the host has requested that their assignment be terminated.¹³ Indeed it is often thought that the most ‘straight-forward’ unfair dismissal claim a LHE can bring is one which is ‘addressed to the [LHF], being the entity with which he/she has a contract’ of employment.¹⁴

This paper demonstrates as false the assumption that LHEs are adequately protected under unfair dismissal laws. This is achieved through an analysis of the decisions of state and federal industrial tribunals, which highlight three important respects in which unfair dismissal laws provide inferior protection for LHEs. First, past and present definitions of ‘unfair dismissal’ provide no guidance as to whether a LHF’s decision to terminate an employees’ labour hire assignment with a particular host constitutes a ‘dismissal’. In turn, the prevalent tribunal approach is to treat the employment relationship between the LHF and LHE as on-going if the employee remains ‘on the books’ of the firm. This approach puts LHEs in the objectionable position of having lost access to their livelihood and yet being denied the usual protections attached to such a loss. An alternative tribunal approach recognises that where an on-going

⁵ Ibid 177-9. See also, Standing Committee on Employment, Workplace Relations and Workforce Participation, House of Representatives, *Inquiry into Independent Contractors and Labour Hire Arrangements* (August 2005) 146-7 and 168.

⁶ *Fair Work Act 2009* (Cth) (*Fair Work Act*).

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 1 (Julia Gillard, Minister for Employment and Workplace Relations).

⁸ Note: It should be noted, however, that Ch 3, Div 6 of the *Fair Work Act 2009* (Cth) prohibits sham arrangements, including misrepresenting employment as independent contracting arrangements (s 357) and dismissing an individual employee in order to engage the individual as an independent contractor (s 358).

⁹ *Fair Work Act 2009* (Cth) s 386(1)(a)-(b).

¹⁰ Ibid s 385.

¹¹ See for instance, M J Pittard and Richard B Naughton, *Australian Labour Law: Text, Cases & Commentary* (Lexis Nexis Butterworths, 2010) 110-142; Colin Fenwick, ‘Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry’ (1992) 5(3) *Australian Journal of Labour Law* 237; Collins, above n 1; Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 1; Simon Curran, ‘When is a Duck not a Duck? The Employee/Independent Contractor Dichotomy’ (2004) *Law Society Bulletin* 24.

¹² Pittard and Naughton, above n 11, 136-8; Jen Anderson, Toby Archer and Vera Smiljanic, Submission No 9 to the Economic Development Committee, *Inquiry into Labour Hire Employment in Victoria*, 19 December 2003, 19-21. See, however, *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna).

¹³ It should be noted that the difficulties are mentioned in passing in Anderson, Archer and Smiljanic, above n 12, 20; and in Underhill and Rimmer, above n 3, 178-9.

¹⁴ Sean Selleck, *Labour Hire – Why it is not as Simple as You May Think* (June 2003) Specialist News, Workplace Express < <http://www.ecruiting.com.au/express/200306/04selleckspeech.htm> > [13].

employment relationship is conducted in the context of a particular host-workplace, this employment relationship ceases when the assignment ends. This approach better protects LHEs but unfortunately remains a minority position amongst tribunal members.

Second, tribunals often focus exclusively on the employer LHF's 'reason' for the dismissal in assessing substantive unfairness. Commonly, the LHF's reason for the dismissal is based on the request of the host to terminate the assignment and as such fails to meet the test of being harsh, unjust or unreasonable. At the same time, the exclusive focus on the LHF's reasons provides a *carte blanche* to hosts to request termination of the assignment on unfair grounds. Certain tribunal members have raised the possibility, without deciding, that the host's reasons may be relevant if, for instance, the LHF co-conspired with the host in relation to the unfair ground; or if the doctrine of vicarious liability is extended to make LHF's responsible for the unfair decisions of hosts. Unfortunately, however, neither potential avenue has been confirmed by tribunal decisions to date.¹⁵

Finally, in accordance with previous legislative regimes, the *Fair Work Act* provides tribunals with a certain amount of discretion in determining what constitutes procedural fairness in individual cases.¹⁶ The effects of such discretion in labour-hire cases gives cause for concern. Tribunals have been willing to accept a low standard of procedural fairness where LHF's have entered into contractual arrangements with hosts that do not provide for the implementation of a fair dismissal procedure, but rather 'compel' the LHF to terminate the assignment upon the host's request. In doing so, tribunals are giving a green light to LHF's to contract out of the employer obligation to establish fair procedural standards for dismissals.

This paper is divided into four parts. Section II briefly describes the rise of LHEs and the problems of labour-hire contracts. Section III analyses current protection for LHEs against unfair dismissals. It begins with a brief discussion of the *Fair Work Act's* definition of an unfair dismissal, establishing that this definition is in most respects identical to the definition of unfair dismissal under previous federal and state industrial legislation. This section then focuses on the difficulties faced by LHEs in establishing that their employment relationship has been terminated at the LHF's initiative; and the complexities involved in establishing substantive and procedural unfairness. Section IV concludes that LHEs do not have assured access to unfair dismissal laws in making claims against LHF's.¹⁷

II. EMPLOYEE VULNERABILITY UNDER LABOUR-HIRE ARRANGEMENTS IN AUSTRALIA

Prior to an analysis of tribunal decisions, it is important to understand the extent of the problem of labour-hire arrangements in Australia and the nature of the contractual arrangements between LHF's, LHEs and hosts. The latter is particularly important because these arrangements are at the heart of the difficulties faced by LHEs both in establishing that a dismissal has taken

¹⁵ This includes an analysis of tribunal decisions up to October 2010.

¹⁶ Pursuant to s 387 of the *Fair Work Act 2009* (Cth), FWA may take into account 'any other matters that FWA considers relevant'.

¹⁷ It should be noted that it is beyond the scope of this article to explore the interaction between unfair dismissal, unfair contracts, adverse action and redundancy claims by LHEs. Assessing these alternative avenues would be extremely useful in providing a comprehensive list of options for LHEs when their assignment is terminated at the host's request.

place (as the LHF has no contractual obligation to the LHE to provide on-going work) and that the termination of the assignment was unfair (given the LHF is often contractually compelled to terminate the assignment upon the host's request).

Since the 1980s there has been a shift away from the vertical integration of production, with companies increasingly engaging 'outsiders' such as the homeworkers and labour-hire workers, to perform tasks hitherto undertaken by direct employees.¹⁸ The growth of labour-hire arrangements is part of this larger narrative of 'vertical disintegration'.¹⁹ The term 'labour-hire arrangements' covers both the use of labour-hire workers engaged as employees and independent contractors. While statistics are not available on the growth of labour-hire *employees* in particular, ABS data indicates a marked growth in the use of labour-hire arrangements in general over the last decade in Australia. For instance in 2002, labour-hire workers (contractors and employees) accounted for 3.9% of all employed people, a five-fold increase since 1990.²⁰ Anecdotal evidence further indicates that labour-hire workers share of employment continues to grow in Australia.²¹

Existing literature addresses the reasons behind the sudden rise of labour-hire workers.²² Suffice to say, many hosts see labour-hire arrangements as providing a 'flexible workforce to meet peaks in demand' and as 'reducing costs' associated with direct employment, including avoiding so-called costly unfair dismissal claims.²³ Host employers can also capture many of the traditional benefits of direct employment such as day-to-day control over the LHE.²⁴ In turn, LHF's make sizable profits from fees earned in supplying LHEs to hosts.²⁵

These benefits are attained by virtue of the contractual arrangements under which LHEs work, and which typically involve 'contracts on two sides of the [labour-hire] triangle'.²⁶ The first is a contract of employment between the LHF and the employee, under which it is agreed that the LHF will hire out the employee's 'services to a client, or a series of clients'.²⁷ The contract often states that 'there is no guarantee of on-going work', and that the employee is to be engaged and paid as a 'casual'.²⁸ Statistically, LHEs are 'overwhelmingly engaged on a casual basis', even if their position at the host firm involves full-time hours.²⁹ What's more, LHEs often have no

¹⁸ Collins, above n 1, 353; A. D. Frazer, 'Labour Law and Productive Decentralisation: Australian Report' (Report, XVIII World Congress of Labour and Social Security Law, 5-8 September 2006) 2; See also Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 2nd ed, 2009) 57 - 65.

¹⁹ Collins, above n 1, 354; Frazer, above n 18, 3.

²⁰ Patrick Laplagne, Maurice Glover and Tim Fry, 'The Growth of Labour Hire Employment in Australia Report' (Productivity Commission Staff Working Paper, February 2005) 7. See also Australia Bureau of Statistics, 'Forms of Employment Survey' (Cat. No. 6359.0, November 2001).

²¹ Underhill and Rimmer, above n 3, 175. Note: the ABS plans to collect information of people who found their current job through a labour hire firm/employment agency again in November 2011, according to Australia Bureau of Statistics, 'Forms of Employment' (Cat. No. 6359.0, November 2009) 39.

²² See Laplagne, Glover and Fry, above n 20, 32-36.

²³ Standing Committee on Employment, Workplace Relations and Workforce Participation, above n 5, 36; Dr Linda Brennan, Dr Michael Valos and Professor Keven Hindle, 'On-Hired Workers in Australia: Motivations and Outcomes' (RMIT Occasional Research Report, December 2003) 7.

²⁴ Brennan, Valos and Hindle, above n 23, viii.

²⁵ *Ibid* 6-7.

²⁶ Stewart, *Stewart's Guide to Employment Law*, above n 18, 63.

²⁷ Stewart, 'Redefining Employment?', above n 11, 17-18. Note: This is distinct from 'employment agencies' which broker employment contracts but have no on-going contractual relationship with the worker.

²⁸ Anderson, Archer and Smiljanic, above n 12, 20.

²⁹ Economic Development Committee, above n 2, 17. See also Standing Committee on Employment, Workplace Relations and Workforce Participation, above n 5, 40; New South Wales Government, Submission No 35 to the Standing Committee on Employment, Workplace Relations and Workforce Participation, *Inquiry into Independent Contractors and Labour Hire Arrangements*, 11 March 2005, 10.

guarantee under the contract of employment of an immediate – *or any* – reassignment if a host dismisses them.³⁰ Rather, the LHE will remain ‘on the books’ of the LHF and the contract may commit a LHF to use its ‘best endeavours’ to procure offers of work from time to time, for and on behalf of the employee.³¹ Nor are LHF’s under an obligation to pay LHE’s between assignments.³² Thus LHE’s incomes depend on the continuance of an assignment with their respective host.³³

The second side of the triangle is a commercial contract between the LHF and the host for the supply of labour by the LHF in exchange for the payment of fees.³⁴ This contract will usually stipulate that the LHF will assume administrative obligations relating to the payment of wages.³⁵ It is also ‘generally stipulated’ that the LHF is to officially terminate an employee’s assignment with the host, either whenever the host wishes, or in defined circumstances.³⁶

Finally, no express contractual relationship exists between the LHE and the host.³⁷ Unless an *implied* contract of employment is found to exist between the host and the LHE,³⁸ the host cannot ‘be made a respondent to an unfair dismissal claim’.³⁹ Regardless, the host will exercise day-to-day control over the LHE and be, in a practical sense, the source of the worker’s livelihood.⁴⁰ Indeed, individual hosts are increasingly responsible for the livelihood of LHE’s in the long-term.⁴¹ While LHE’s were traditionally ‘temps who could fill in until permanent staff returned from leave or a vacancy could be filled’, increasingly many workers ‘can find themselves working for a particular (host) on an ongoing basis’.⁴² Indeed, it is not unknown for a LHE to be with a host for 8 years before being dismissed.⁴³

In summary, LHF’s ‘intercede in the employment relationship itself, dividing up and redistributing the varied managerial practices that were formerly unified within the bipartite employment relationship’.⁴⁴ The result is that:

³⁰ See Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 4th ed, 2005) 282.

³¹ Stewart, ‘Redefining Employment?’, above n 11, 18. See for instance *Jane Savage v Department of Education* [2004] AIRC 947727 (7 June 2004) (Commissioner Foggo) [84].

³² This can be contrasted to some EU countries, where LHE’s are paid between assignments: John Burgess, Erling Rasmussen and Julia Connel, ‘Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net’ (2004) 29 *New Zealand Journal of Employment Relations* 25, 30.

³³ *Ibid* 30.

³⁴ Economic Development Committee, above n 2, 15.

³⁵ *Ibid* 15. Superannuation and taxation are also usually paid by the LHF. See *Kwee-Sang Choong v Bridgestone Australia Limited* [2008] AIRC 980932 (29 February 2008) (Senior Deputy President O’Callaghan) [7] - [9] and *Mr Charles Fitzpatrick v Roads Corporation* [2007] AIRC 977769 (25 July 2007) (Commissioner Grainger) [8]; *DeAnn Polkinghorne v Telus Pty Ltd* [2000] AIRC T3741 (27 November 2000) (Commissioner Deegan) [6].

³⁶ Creighton and Stewart, above n 30, 281.

³⁷ *Ibid*.

³⁸ See for instance *Franks v Reuters Ltd & First Resort Employment Ltd* [2003] EWCA Civ 417; *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna). An employment relationship was also found to have continued between a host and worker – despite the worker being told he would no longer be employed directly in *Damevski v Giudice* (2003) 202 ALR 494.

³⁹ Creighton and Stewart, above n 30, 282.

⁴⁰ Economic Development Committee, above n 2, 16.

⁴¹ Stewart, ‘Redefining Employment?’, above n 11, 17.

⁴² *Ibid* 17.

⁴³ *Mr Charles Fitzpatrick v Roads Corporation* [2007] AIRC PR977769 (25 July 2007) (Commissioner Grainger).

⁴⁴ Iain Campbell, Ian Watson and John Buchanan, ‘Temporary agency work in Australia (Part I)’ in John Burgess and Julia Connell (eds), *International Perspectives on Temporary Agency Work* (Routledge, 2004) 129, 130.

some practices remain with the [host employer], which retains the responsibility for directing the labour; some are transferred to the [LHF], which now often claims the role of legal employer; and still others tend to disappear in the interstices of the triangular relationship.⁴⁵

Employees' ability to seek effective redress in unfair dismissal claims is but one element of the employment relationship that is diminished under the triangular structure.⁴⁶

III. THE INADEQUACY OF CURRENT PROTECTION FOR LABOUR-HIRE EMPLOYEES AGAINST UNFAIR DISMISSAL

Since the Howard Government introduced *Work Choices*,⁴⁷ there has been a shift towards a national industrial relations system.⁴⁸ The Howard Government relied upon s 51(xx) of the *Constitution* to cover all constitutional corporations and their employees.⁴⁹ The Rudd-Gillard Government continued this expansion under the *Fair Work Act*,⁵⁰ securing the agreement of most State and Territories to refer their surviving powers.⁵¹ One result is that Federal unfair dismissal laws now cover the majority of employees in Australia, including LHEs.⁵²

According to the Rudd-Gillard Government, a key aim of the *Fair Work Act* is to deliver 'protections from unfair dismissal for all employees'.⁵³ While this rather sweeping characterisation of the reforms to statutory unfair dismissal laws is not entirely accurate,⁵⁴ the Federal Government was concerned to establish a break from the 'clear injustices' of the *Work Choices* regime which had significantly reduced the pool of workers protected from unfair dismissals.⁵⁵ This was primarily achieved by winding back the '100 employee exemption' under *Work Choices*,⁵⁶ along with the abandonment of the 'operational reasons' defence⁵⁷ and an extension of protection from unfair dismissals for 'short term casual employees' and fixed term/task or seasonal contract employees under defined circumstances.⁵⁸

The *Fair Work Act's* definition of an 'unfair dismissal' is one less publicised area of continuity with previous industrial relations regimes. Section A briefly explores this continuity. Section B then analyses problems faced by LHEs in bringing claims under past and current statutory definitions of an 'unfair dismissal'. The latter section analyses state and federal tribunals' decisions made prior to the introduction of the *Fair Work Act* as such decisions indicate the difficulties that LHEs will continue to endure, given that the current definition of 'unfair dismissal' is broadly similar to that which existed under former industrial legislation. Fair Work Australia (FWA)⁵⁹ decisions are also analysed where applicable.

A *The Absence of Legislative Protection for Labour-Hire Employees*

Under the *Fair Work Act*, LHEs must show that they have *been dismissed*,⁶⁰ which is defined to mean that the 'person's employment with his or her employer has been terminated on the employer's initiative'⁶¹ or, that the person in question was forced to resign from his or her employment 'because of conduct, or a course of conduct, engaged in by his or her employer'.⁶² This dismissal must be 'harsh, unjust or unreasonable' and not a case of 'genuine redundancy'.⁶³

⁴⁵ Ibid.

⁴⁶ Underhill and Rimmer, above n 3, 177-179.

Pursuant to s 387, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

⁴⁷ *Workplace Relations Amendments (Work Choices) Act 2005* (Cth). The *Work Choices* legislation amended the *Workplace Relations Act 1996* (Cth).

⁴⁸ Stewart, *Stewart's Guide to Employment Law*, above n 18, 7.

⁴⁹ *Ibid* 8.

⁵⁰ *Fair Work Act 2009* (Cth).

⁵¹ Lenny Roth, 'Industrial relations update: The referral of powers and the Fair Work Act 2009' (E-Brief No 2/10, Parliamentary Library, NSW, January 2010) 2. Note: Western Australia declined the offer to refer its' powers.

⁵² Stewart, *Stewart's Guide to Employment Law*, above n 18, 27-29; *Fair Work Act 2009* (Cth) s 26 (2)(v). It should be noted, however, that not all employees have access to unfair dismissal laws under the *Fair Work Act*. Only national system employees (NSE) are eligible to bring claims for unfair dismissal, pursuant to s 380. Furthermore, pursuant to s 382(a) of the *Fair Work Act*, NSE who have not completed the required minimum employment period with their employer are not protected from unfair dismissal (see s 383 for a definition of the 'minimum employment period'). In addition, NSE who are not covered by a modern award or enterprise agreement and whose annual rate of earnings exceeds the high income threshold (see s 329 – 333 of the *Fair Work Act*) are not protected from unfair dismissal, pursuant to s 382(b).

⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 1 (Julia Gillard, Minister for Employment and Workplace Relations).

⁵⁴ For instance, Anna Chapman questions the extent to which the *Fair Work Act* has brought about a 'new system of unfair dismissal' laws. See Anna Chapman, 'The Decline and Restoration of Unfair Dismissal Rights' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the WorkChoices Legacy* (The Federation Press, 2009) 224.

⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 7 (Julia Gillard, Minister for Employment and Workplace Relations). Estimates vary as to the number of workers excluded from unfair dismissal protections under Work Choices. The Explanatory Memorandum for the *Fair Work Bill 2008* suggests that 'approximately 4.6 million (or 56 percent) of employees' were excluded from unfair dismissal protections under Work Choices. For more detail on the scope of protection under *WorkChoices*, see Explanatory Memorandum, *Fair Work Bill 2008* xlv [205] and [210].

⁵⁶ Many employees were excluded under *Work Choices* because unfair dismissal laws only applied to employees working in businesses with more than 100 staff and who have met a six month qualifying period of employment. See the *Workplace Relations Act 1996* (Cth) s 643(10).

⁵⁷ Under *Work Choices* if one of the reasons for the dismissal was a 'genuine operational reason' the employee was unable to challenge the dismissal. See the *Workplace Relations Act 1996* (Cth) s 643(8).

⁵⁸ 'Short term casual employees' (with less than 12 months regular and systematic employment), fixed term/task employees and trainees were also exempt categories of workers in relation to unfair dismissal protections under *Work Choices*. In contrast, under the *Fair Work Act*, casual employees are protected from unfair dismissals after serving the standard 6 month minimum employment period if their employment is regular and systematic and if they have a reasonable expectation of ongoing employment (s 384(2)(a)) and if they are not working for a small business employer (see s 383(b)). In addition, if fixed term/task or seasonal contract employees 'are let go in the middle of their contracts, they can now potentially make a claim unless excluded on some other basis', Stewart, *Stewart's Guide to Employment Law*, above n 18, 302. Trainee employees are now also covered by federal unfair dismissal laws. See the *Fair Work Act 2009* (Cth) s 386(2)(a)-(b).

⁵⁹ Note: FWA is the new federal industrial tribunal, which has replaced the Australian Industrial Relations Commission.

⁶⁰ *Fair Work Act 2009* (Cth) s 385(a).

⁶¹ *Ibid* s 386(1)(a).

⁶² *Ibid* s 386(1)(b).

⁶³ *Ibid* s 385(b) and (d).

- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) *any other matters* that FWA considers relevant.

Importantly, the *Fair Work Act* introduced the concept of a ‘genuine redundancy’, replacing the previous defence under the Howard Government’s *Workplace Relations Act*⁶⁴ that a dismissal was motivated by a ‘genuine operational reason’.⁶⁵ In most other respects, however, the definition of an ‘unfair dismissal’ is similar to that adopted under previous State and Federal regimes.⁶⁶ For instance, under the *Workplace Relations Act* applicants were required to demonstrate that there had been a termination of employment ‘at the initiative of the employer’,⁶⁷ or that ‘the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer’.⁶⁸ State industrial legislation similarly refers to unfair dismissals by an ‘employer’, as opposed to a third party such as a host employer.⁶⁹ Previous industrial relations regimes also required applicants to establish that the dismissal was ‘harsh, unjust or unreasonable’ or similar.⁷⁰ In addition, the *Workplace Relations Act* and *Fair Work Act*’s statutory criteria for assessing substantive and procedural harshness are almost identical,⁷¹ and in turn reflect ‘the approach originally developed by State tribunals in assessing the fairness of dismissals’.⁷² Finally, no past or present industrial relations

⁶⁴ Note: The Howard Government’s *Work Choices* legislation (*Workplace Relations Amendments (Work Choices) Act 2005* (Cth)) amended the *Workplace Relations Act 1996* (Cth).

⁶⁵ *Ibid* s 643(8); Stewart, *Stewart’s Guide to Employment Law*, above n 18, 309.

⁶⁶ Chapman, above n 54, 224. See also the definition of ‘dismissal’ under ILO Convention 158 *Termination of Employment Convention, 1982 (No. 158)* opened for signature 22 June 1982, ATS 1994 No. 4 (entered into force 23 November 1985) art 3 (ILO Convention 158). Art 3 notes that ‘termination of employment’ means the termination of employment at the initiative of the employer. Note: the adoption of a ‘Small Business Dismissal Code’ is also distinct.

⁶⁷ See *Workplace Relations Act 1996* (Cth) s 642(1).

⁶⁸ This was included under the *Workplace Relations Act 1996* (Cth) under s 642(4), following the *Work Choice* amendments.

⁶⁹ For instance, pursuant to s 84(1) of the *Industrial Relations Act 1996* (NSW) and s 106 of the *Fair Work Act 1994* (SA), an employee is covered by unfair dismissal laws ‘(i)f an employer dismisses an employee’. In addition, while the *Industrial Relations Act 1979* (WA); *Industrial Relations Act 1999* (Qld); and *Industrial Relations Act 1984* (Tas) do not specifically refer to a dismissal by an ‘employer’, tribunals have still interpreted such legislation as requiring a dismissal by an employer. See for instance, *Martin Healey v Targaze Pty Ltd T/A Intergrated Workforce* [1997] WAIRComm 1439 (21 February 1997) (Commissioner A. R. Beech) and *Arthur Cowl v Steelweld Personnel Pty Ltd* [1997] WAIRComm 95 (13 May 1997) (Commissioner J. F. Gregor).

⁷⁰ Pursuant to s 643(1)(a) of the *Workplace Relations Act 1996* (Cth) an unfair dismissal is one that is ‘harsh, unjust or unreasonable’. Similar definitions of an ‘unfair dismissal’ exist under state legislation; s 84(1) of the *Industrial Relations Act 1996* (NSW) refers to a an unfair dismissal as one that is ‘harsh, unreasonable or unjust’; s 73(1) of the *Industrial Relations Act 1999* (Qld) refers to an unfair dismissal as one that is ‘harsh, unjust or unreasonable’ or ‘for an invalid reason’; s 108(2) *Fair Work Act 1994* (SA) refers to an unfair dismissal as one that is ‘harsh, unjust or unreasonable’ and s 23A of the *Industrial Relations Act 1979* (WA) refers to an unfair dismissal as one that is ‘harsh, oppressive or unfair’.

⁷¹ The definitions are the same, save that the *Fair Work Act* ‘adds a reference to any unreasonable refusal by the employer to allow the employee to have a support person with them in discussions relation to the dismissal; Chapman, above n 54, 221.

⁷² Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation Press, 1st ed, 2008) 307.

legislation in Australia provides specific protections against unfair dismissals for LHEs.⁷³ This is despite the recommendation of several Labor MPs, while in opposition, that special legislative attention be given to LHEs, to ensure that such ‘employees have the right to challenge a termination of employment’.⁷⁴ Thus, the definition of ‘unfair dismissal’ largely represents a continuation of, rather than a break from, previous regimes.

B *The Problematic Nature of Claims made Against the Labour-Hire Firm*

Barring a change in approach by FWA, LHEs are therefore likely to face the same challenges in establishing an unfair dismissal claim as under predecessor regimes given the similarity between past and present definitions of ‘unfair dismissal’.

Part B(1) addresses the first major challenge for LHEs - establishing that a dismissal has occurred at the LHF’s initiative.⁷⁵ Many LHEs who have had their host assignment terminated will still have on-going contracts with – and remain on the books of – the LHF.⁷⁶ In this situation it is common for LHF’s to argue that they have not terminated the employment relationship.⁷⁷ The response of tribunals to this argument has been inconsistent, and is oft described as confusing.⁷⁸ Despite this, the decisions of tribunals can be grouped into two broad categories – the first is an approach centred on the prospect of future assignments, while the second focuses on the cessation of on-going work.⁷⁹ Under the former approach, whether a dismissal has taken place will turn on the willingness of the LHF to provide alternative assignments to the LHE. If the LHF proves sufficiently ‘willing’ to re-assign the LHE, the employment relationship is deemed not to have been terminated at the LHF’s initiative. This approach is undesirable both because the underlying rationale for the approach is unclear, and because in consequence of this approach, LHEs who have lost their livelihood through the termination of a host assignment may be denied access to unfair dismissal laws if the LHF remains ‘keen’ to re-assign them. In contrast, the latter approach better protects LHEs by holding that a LHF’s decision to terminate a LHE’s on-going, regular work with a particular host will constitute a dismissal. The underlying rationale for this latter approach is also clear and therefore likely to lead to more principled outcomes.

Part B(2) addresses the second major challenge for LHEs - establishing that a procedural or substantive aspect of the dismissal is harsh, unjust or unreasonable.⁸⁰ The LHF’s decision to dismiss an employee is often based on the fact that the host no longer wishes to engage the LHE, and it is therefore difficult for LHEs to establish that a LHF’s dismissal is substantively unfair. At the same time, tribunals are reluctant to consider unfairness on the part of the host in requesting termination of the assignment, given the host is not a party to the employment contract. In consequence, LHEs are vulnerable to the ‘whims’ of the host who may initiate a

⁷³ It should be noted that an SA Government Commissioned review in 2002 recommended that new legislation address ‘unfair dismissal claims by labour hire workers against host businesses’. This recommendation was not, however, adopted under the *Fair Work Act 1994* (SA) which came into effect in 2005. See Standing Committee on Employment, Workplace Relations and Workforce Participation, above n 5, 47.

⁷⁴ Standing Committee on Employment, Workplace Relations and Workforce Participation, above n 5, 168. Recommended by Mr Brendan O’Connor; Mr Tony Burke; Ms Annette Ellis and Ms Jill Hall.

⁷⁵ See *Fair Work Act 2009* (Cth) s 385(a) and 386(1).

⁷⁶ Selleck, above n 14, [18]; Anderson, Archer and Smiljanic, above n 12, 20.

⁷⁷ Anderson, Archer and Smiljanic, above n 12, 20.

⁷⁸ Selleck, above n 14, [19]; Anderson, Archer and Smiljanic, above n 12, 20.

⁷⁹ Note: I am not aware of any existing taxonomy in case law or academic writings.

⁸⁰ *Ibid* s 385(b) and (c), 387 and 389.

termination of the assignment on unfair grounds. Several tribunal decisions have raised the possibility that a host's reasons may be relevant, but this possibility has not been confirmed by tribunal decisions to date. Finally, tribunals accept that the degree of procedural fairness which LHF's should afford to LHE's will turn on the degree of influence LHF's have over the termination by virtue of the contractual arrangements LHF's have concluded with the host. Thus, unfortunately, tribunals are in effect permitting LHF's to exclude procedural fairness guarantees for their employees under contracts concluded with a host.

1 Complexities Involved in Establishing a Dismissal at the Employer's Initiative

(a) The "On the Books" Approach to Dismissal: Undermining Protections for LHE's

The most common tribunal approach is to focus on the willingness of the LHF to re-assign the applicant as the primary indicator of whether a dismissal has taken place. Unfortunately, tribunals have rarely articulated *why* the prospect of future assignments are relevant to determining whether a dismissal has occurred.⁸¹ For even if an alternative assignment is offered and accepted, it is questionable whether this means that the *same* employment relationship has continued, particularly where the hours, pay and conditions have been varied.⁸² The LHF might argue that reassignment is a mere demotion,⁸³ but ordinarily a demotion constitutes a dismissal unless there is no significant reduction in the worker's remuneration or duties.⁸⁴ And, unless the new assignment begins immediately, the LHE will be without remuneration until the assignment is offered and accepted.⁸⁵ Nevertheless, the emphasis on future assignments seems to flow from a characterisation of the labour-hire arrangement as one of 'precarious employment' where the employee may work from 'time to time' on assignments arranged by the LHF.⁸⁶ In turn, if the LHF is willing to uphold the precarious arrangement by striving to offer work, tribunals have tended to accept that the employment relationship has not been terminated by a LHF who remains "keen".⁸⁷

Claims are not universally rejected under this approach. Rather, different thresholds have emerged as to when a respondent will be successful, making it difficult for applicants to predict whether their claim will be accepted. The factors considered by tribunals under this approach are whether the LHF remains *willing* to re-assign the LHE (the lowest threshold); whether an assignment has been *offered* with a new host or the old host (a higher standard); and finally whether the offer of work is *genuine and practicable* (the highest standard).

The lowest threshold is an acceptance that the applicant remains on the books and that the firm is willing to place the applicant with other clients. This was accepted at first instance by the

⁸¹ A rare example is *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRComm 62 (23 July 1998) (Deputy President P. Hampton), discussed below.

⁸² Creighton and Stewart, above n 30, 473.

⁸³ This was argued and rejected in *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan) [22].

⁸⁴ Stewart, *Stewart's Guide to Employment Law*, above n 18, 304.

⁸⁵ Note: this is despite the fact that employers are ordinarily required to provide pay if a worker is suspended: *Mann v Capital Territory Health Commission* (1981) 54 FLR 23, 31; *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647, 650.

⁸⁶ See for instance *Jason Craig Warburton v Challenge Recruitment* [2002] AIRC 913793 (1 February 2003) (Senior Deputy President Williams) [14].

⁸⁷ *Ibid.*

AIRC⁸⁸ in *Yan Xu*.⁸⁹ Similarly, in *Healey*⁹⁰ and *Arthur Cowl*⁹¹ the WAIRC⁹² determined that the respective applicants 'remain[ed] on the books as a casual employee' and were 'able to ring [the LHF] to see if any work [was] offered'.⁹³ In contrast, the NSWIRC⁹⁴ in *Oanh Nguyen*⁹⁵ did not view the retention of the applicant on the books as sufficient to suggest that the employment relationship continued to exist. Rather the Commission perceived that, after the applicant's work had ceased with the host:

all that was left was the *empty husk of a relationship* [with the LHF, as] ... the applicant remained "on the books" ... as a labour hire casual *but was not offered any further work*.⁹⁶

The LHF *may* be on safer grounds if it has *offered* the LHE further work. In *Warburton*,⁹⁷ the LHF informed the LHE that the assignment had been terminated and offered alternative work.⁹⁸ The AIRC accepted that 'alternative employment could be provided and was offered' and the applicant remained registered with the firm.⁹⁹ Similarly in *Maloney*¹⁰⁰ the AIRC accepted that no termination had occurred, because the LHF had offered the applicant an alternative placement and would 'still be interested in trying to obtain work' for him.¹⁰¹

A similar standard is contemplated in *JC Techforce*, a case in which the SAIRC¹⁰² was concerned with whether the LHF had sought to re-supply the applicant with their original host, as opposed to a new host.¹⁰³ The original host had terminated the applicant's assignment purportedly due to a downturn in work.¹⁰⁴ The LHF had 'sought (other) employment opportunities' for the applicant, but this was not accepted as an indication that the employment relationship had continued.¹⁰⁵ For despite the LHE contacting the LHF regarding further work, the LHF did not try to re-place the LHE with the original host when notified by this host of vacancies.¹⁰⁶ The SAIRC held that the LHF had failed to determine whether the LHE could be re-supplied and that this failure was particularly acute given the LHF was 'without an indication that the applicant

⁸⁸ Australian Industrial Relations Commission.

⁸⁹ *Yan Xu v Skilled Engineering Ltd* [1998] AIRC 30014 (26 May 1998) (Senior Deputy President Watson, Deputy President Duncan and Commissioner Hingley). Note: The reason for the original decision was cited on appeal. On appeal, this issue was not decided as the application was rejected on other grounds.

⁹⁰ *Martin Healey v Targaze Pty Ltd T/A Intergrated Workforce* [1997] WAIRComm 1439 (21 February 1997) (Commissioner A. R. Beech).

⁹¹ *Arthur Cowl v Steelweld Personnel Pty Ltd* [1997] WAIRComm 95 (13 May 1997) (Commissioner J. F. Gregor).

⁹² Western Australian Industrial Relations Commission.

⁹³ *Martin Healey v Targaze Pty Ltd T/A Intergrated Workforce* [1997] WAIRComm 1439 (21 February 1997) (Commissioner A. R. Beech) [6]. A similar statement was made in *Arthur Cowl* at [9].

⁹⁴ New South Wales Industrial Relations Commission.

⁹⁵ *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna).

⁹⁶ *Ibid* [14].

⁹⁷ *Jason Warburton v Challenge Recruitment* [2002] AIRC 5732 (1 February 2002) (Senior Deputy President Williams).

⁹⁸ *Ibid* [11].

⁹⁹ *Ibid* [14].

¹⁰⁰ *R. Maloney v Bramley Services t/as National Manufacturing Recruitment* [2002] AIRC 7766 (7 March 2002) (Commissioner Eames).

¹⁰¹ *Ibid* [4].

¹⁰² South Australian Industrial Relations Commission.

¹⁰³ *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRCComm 62 (23 July 1998) (Deputy President P. Hampton).

¹⁰⁴ *Ibid* Heading 5, 'The Factual Basis as Found by the Commission'.

¹⁰⁵ *Ibid* Heading 3.2, 'The Position of the Parties and Case Outline: The Respondent's Case': 'it had retained the applicant on the books and sought employment opportunities for her. This was consistent with the arrangements made with the applicant and with the operation of the labour hire industry generally'.

¹⁰⁶ *Ibid*.

would not be accepted' by the original host.¹⁰⁷ Thus the SAIRC concluded that 'the respondent has made a decision that has in my view led to the cessation of employment and the dismissal of the applicant'.¹⁰⁸ The tribunal did, however, accept the respondent's submission that 'there was no guarantee that the client would accept the applicant', but determined that the firm 'must bear responsibility' for failing to offer.¹⁰⁹ The tribunals reasoning seems to suggest that if the LHF *offered* the applicant's services, *even in vain*, the tribunal may have accepted that the employment relationship had not been terminated at the LHF's initiative.

Finally, the highest threshold is where tribunals have required that the offer of work is genuine and/or practicable. For instance, in *De Bono*¹¹⁰ an offer made after an unfair dismissal claim was lodged was viewed with scepticism on the basis that the offer is 'self-serving'.¹¹¹ Albeit, the tribunal in *Stuart*¹¹² did not criticise an offer of work made on the day before the hearing.¹¹³ Regarding the 'practicality' of reassignment, in *Stuart*¹¹⁴ the AIRC accepted that the reassignment offered was 'a position so far from his home' and so concluded that the applicant had been 'effectively dismissed' when work with his host had ended.¹¹⁵ In contrast, in *Maloney*¹¹⁶ the AIRC did not place any importance on the fact that the only re-assignment offer was a position in a suburb to which the applicant was not prepared to travel.¹¹⁷ And yet even if an offer of work is genuine and practicable, this does not mean that the assignment will be accepted or that the terms of the new engagement are as favourable as those offered on the original assignment. In summary, this approach fails to recognise a dismissal as the loss of livelihood from the particular host assignment.

(b) The "On-Going Work" Approach to Dismissal: Protecting LHEs

As an alternative approach, some tribunals have considered that the employment relationship ends when on-going, casual work ends.¹¹⁸ Under this approach, tribunals first establish the nature of the employment relationship between the parties, before turning to ask whether this relationship has ceased. As noted above, the rationale for this approach is more clearly articulated and provides a higher level of protection for LHEs.

¹⁰⁷ *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRCComm 62 (23 July 1998) (Deputy President P. Hampton), Heading 6.2, 'Discussion: Was the Applicant Dismissed by the Respondent?'.
¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* Held [7].

¹¹⁰ *De Bono v Davids Staffing Solutions* [2002] AIRC 332 (3 May 2002) (Commissioner Whelan).

¹¹¹ *De Bono v Davids Staffing Solutions* [2002] AIRC 332 (3 May 2002) (Commissioner Whelan) [23]. See also *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna) [14].

¹¹² *G Stuart v G P R Engineering* [1999] AIRC PR8479 (27 August 1999) [13] (Commissioner Raffaelli).

¹¹³ *Ibid* [4].

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* [6].

¹¹⁶ *R. Maloney v Bramley Services t/as National Manufacturing Recruitment* [2002] AIRC 7766 (7 March 2002) (Commissioner Eames).

¹¹⁷ *Ibid* [3].

¹¹⁸ *Fary v Clements Techforce Pty Ltd (Appeal)* [2002] SAIRCComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield); *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRCComm 13 (29 March 2004) (Deputy President PJ Hampton); *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan) [21]-[23]; *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102; *Jennifer Ethel Isaacs v Kelly Services (Australia) Limited* [2005] AIRC 1829 (22 April 2005) (Deputy President McCarthy).

(i) *The True Nature of the Labour-Hire Employment relationship*

Firms often submit that, in a labour-hire arrangement, the employment *relationship* is *on-going*¹¹⁹ but the *actual work* is potentially irregular and subject to reassignment.¹²⁰ This position relies on ‘the terms of employment [that] specifically cater for the placement of the temp on different assignments with different hosts from time to time ... which is a standard provision in labour hire contracts’, and on an acceptance that this is simply the ‘nature’ of labour-hire work.¹²¹ Therefore unlike other on-going employment relationships,¹²² the LHE can form no reasonable expectation regarding continuity of employment.¹²³

Tribunals applying the “on-going work” approach have rejected this submission when the employee has been engaged in on-going, regular work. Tribunals have done so on the basis that contractual form should not dominate over ‘the reality of the work relationship’.¹²⁴ In *Fary*,¹²⁵ the SAIRC concluded that Mr Fary had ‘an expectation of continuing employment ... at the [host’s] premises’, despite being ‘employed by a labour hire firm on the basis that his employment would be assignment based’.¹²⁶ Aside from the written contractual terms,¹²⁷ Mr Fary met the usual criteria indicating a continuing contract, including having regular full-time hours and no indication from either host or LHF that the work at *this* host would not be on-going.¹²⁸ Similarly in *Costello*,¹²⁹ the SAIRC found that, while the applicant had ‘applied for a position knowing that it was a labour hire placement’, he had worked regularly and systematically with the same host until injured.¹³⁰ The SAIRC held that the applicant ‘had a reasonable expectation that, barring unforeseen circumstances, the work with BSGA would continue’.¹³¹ Finally in *Kelly*,¹³² the AIRC noted:

the applicant had been working, every week, for over two years in accordance with a roster for the same job at Telstra, I do not think that the nature of the contract signed at the commencement of her employment two years previously can be said to make an

¹¹⁹ As opposed to being subject to ‘short-term contracts’: Stewart, *Stewart’s Guide to Employment Law*, above n 18, 275.

¹²⁰ *Fary v Clements Techforce Pty Ltd* (Appeal) [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield) [26].

¹²¹ Selleck, above n 14, [18].

¹²² Ordinarily there is a dichotomy between “temporary casuals” subject to a contract for each shift and “permanent casuals” that have a single, on-going contract of employment; Stewart, *Stewart’s Guide to Employment Law*, above n 18, 275.

¹²³ See for instance the submissions in *Fary v Clements Techforce Pty Ltd (Appeal)* [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield) [29].

¹²⁴ Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) 144.

¹²⁵ *Fary v Clements Techforce Pty Ltd* (Appeal) [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield).

¹²⁶ *Ibid* [20].

¹²⁷ These terms were said to indicate ‘the precarious nature of his employment relationship’; *Fary v Clements Techforce Pty Ltd* [2002] SAIRComm 7 (19 February 2002) (Commissioner JK Lesses) [54].

¹²⁸ *Fary v Clements Techforce Pty Ltd* (Appeal) [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield) [25]-[29]; Reference was made to *Licensed Clubs of Victoria v Higgins* (1988) 30 AILR 497, a case which discussed the ‘signs’ that an individual was a permanent casual.

¹²⁹ *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004) (Deputy President PJ Hampton).

¹³⁰ *Ibid* [143].

¹³¹ *Ibid*.

¹³² *Jennifer Ethel Isaacs v Kelly Services (Australia) Limited* [2005] AIRC 1829 (22 April 2005) (Deputy President McCarthy).

expectation of ongoing employment unreasonable where such expectation is consistent with the experience of two years of employment.¹³³

These and similar decisions¹³⁴ affirm that ‘contracting parties cannot create something with all the features of a rooster and call it a duck’ – that is, describe work as ‘irregular’ and ‘temporary’ when it is in fact on-going and stable.¹³⁵ Tribunals have, however, noted that contractual terms describing work as ‘temporary’ and subject to the demands of the market may bear more significance where a LHF ‘is [simply] seeking to find work for a person who is on its books’.¹³⁶ In this situation, the contractual terms more closely reflect the reality of the relationship between the parties.¹³⁷ On the other hand, once ‘work has been offered and accepted and is being [regularly] performed’, the LHF should not be able to ‘cling’ to the contract in order to deny the employment reality.¹³⁸

(ii) *The Employment Relationship has Ceased*

Having first established the nature of the employment relationship, tribunals assess whether this relationship – as it *actually* developed between the parties – has ceased.¹³⁹ Tribunals have embraced a definition of dismissal involving two steps.¹⁴⁰ First, tribunals ask whether the employee has been ‘removed’ from their on-going, regular employment, and have been thus ‘deprived’ of regular pay.¹⁴¹ The focus on the lack of remuneration is arguably important, given that the ‘basic rule is that the employer has no obligation to provide the employee with work, provided that the agreed wage is paid’.¹⁴² Second, tribunals question whether this cessation was at the initiative of the employer. Where the LHF terminates the assignment at the host’s instructions, tribunals have viewed this as termination at the LHF’s initiative.¹⁴³ For instance, in *Fary*,¹⁴⁴ the tribunal concluded:

[T]here is no escaping the fact that the appellant suddenly found himself ‘sent away’ from what had been a regular working assignment with the client for more than nine months. His services were no longer required on that assignment. He was

¹³³ Ibid [30].

¹³⁴ See also *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O’Callaghan) [21]-[23]; *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRComm 4102 (6 November 2004) (Commissioner A R Beech) [45]-[49].

¹³⁵ Phrase taken from *Application by DJ Porter for an Inquiry into an Election in the Transport Worker’s Union of Australia* (1989) 34 IRC 179, 184, cited in Owens and Riley, above n 143, 144.

¹³⁶ *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRComm 4102 (6 November 2004) (Commissioner A R Beech) [46].

¹³⁷ *Jennifer Ethel Isaacs v Kelly Services (Australia) Limited* [2005] AIRC 1829 (22 April 2005) (Deputy President McCarthy) [30].

¹³⁸ *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRComm 4102 (6 November 2004) (Commissioner A R Beech) [46].

¹³⁹ See for instance, *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O’Callaghan) [22].

¹⁴⁰ This approach was first adopted by Full Court of the Industrial Court of New South Wales in *Smith v Director-General of School Education* (1993) 31 NSWLR 349.

¹⁴¹ *Fary v Clements Techforce Pty Ltd* (Appeal) [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield) [30].

¹⁴² Lexis Nexis, Halsbury’s Laws of Australia (online) (at 22 May 2006) Employment, Employer’s Obligations, ‘Provision of Work’ [165-380]: citing *Mann v Capital Territory Health Commission* (1981) 54 FLR 23, 31; *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647, 650; *C/F William Hill Organisation Ltd v Tucker* [1999] ICR 291, 298-9.

¹⁴³ See for instance, *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O’Callaghan) [22].

¹⁴⁴ *Fary v Clements Techforce Pty Ltd* (Appeal) [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield).

"removed" from his position because his name 'was the one that came up'. His withdrawal from the ... site at the behest of his employer (the respondent) apparently on the instructions of the client ... was against the appellant's will and without his consent. He was consequently 'deprived' of the financial benefits of working on that particular assignment. His regular pay ceased.¹⁴⁵

Finally, under this approach, tribunals have viewed the 'offer' of an alternative assignment as inconsequential unless it is enough to 'alter the fact that [a once] ... continuing contract of "casual" employment was brought to an end'.¹⁴⁶ In *Costello*,¹⁴⁷ the tribunal noted that the 'fundamental nature of the employment contract as it emerged' was one of regular work by the applicant for the particular host.¹⁴⁸ Thus, the fact that post-termination the 'employee was again placed on a list of persons seeking placement' and offered further work was not enough to indicate 'the [same] employment relationship had continued beyond the removal from the host's workplace'.¹⁴⁹ Similarly in *Mr M*,¹⁵⁰ FWA viewed subsequent irregular work on alternative assignments as having been 'undertaken under an entirely different contractual basis' to Mr M's previous on-going, regular work.¹⁵¹

2 *Unfair Barriers to Establishing a Harsh, Unjust or Unreasonable Dismissal*

If a LHE does succeed in establishing that they have been dismissed, the second step is to establish that this dismissal was 'harsh, unjust or unreasonable',¹⁵² either through demonstrating substantive or procedural unfairness.¹⁵³ As noted above, LHEs will find it difficult to establish that the decision of the LHF is unfair where it is simply a response to the request of the host to terminate the assignment; while the host's motivations are for the most part irrelevant in establishing substantive unfairness. Moreover, tribunals often accept that the LHF had no or only a limited ability to influence the dismissal procedure established by the host because the firm was contractually 'compelled' to terminate the assignment upon the host's request. Thus, LHEs are put in the unfair position of having no protection against the decisions made by hosts or against unfair procedures that the LHF is 'compelled' to follow.

(a) The Labour-Hire Firm's Decision is Unlikely to be held to be Unfair

LHF's often state that their *own* decision to terminate the assignment was purely based on the request of the host and/or the host's refusal to continue to engage the LHE.¹⁵⁴ State and federal tribunals have often accepted that a dismissal on these grounds constitutes a redundancy,¹⁵⁵ or

¹⁴⁵ Ibid [30].

¹⁴⁶ Ibid.

¹⁴⁷ *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004) (Deputy President P) Hampton).

¹⁴⁸ Ibid [143]-[144].

¹⁴⁹ Ibid.

¹⁵⁰ *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan).

¹⁵¹ Ibid [22].

¹⁵² *Fair Work Act 2009* (Cth) s 385(b).

¹⁵³ *Fair Work Act 2009* (Cth) s 387.

¹⁵⁴ See for instance: *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRComm 62 (23 July 1998) (Deputy President P. Hampton), Heading 3.2, "The Position of the Parties and Case Outline: The Respondent's Case": "The respondent's role in that context was described by (Counsel) ... in terms of it being merely 'the messenger'". For a rare example of a dismissal at the active initiative of the labour-hire firm see: *Mr Stephen O'Loughlin v APS Group (Placements) Pty Ltd* [2009] FWA 7367 (24 September 2010) (Commissioner Cambridge).

¹⁵⁵ See for instance: *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan).

that this is a valid reason for the termination, even though the reason is not based on the capacity or conduct of the applicant.¹⁵⁶ Additionally, the 'validity' of a decision based on the abovementioned grounds has sometimes turned on whether the contractual arrangements permitted the LHF to dismiss the employee upon the host's request.¹⁵⁷ Furthermore, under the *Fair Work Act*, the LHF will now need to establish that any redundancy was 'genuine'.¹⁵⁸ Per the FWA's decision in *Mr M*,¹⁵⁹ a dismissal will constitute a 'genuine redundancy' if the LHF no longer requires the same number of workers, based on the host's reduced demand, and where there is no opportunity for the LHF to re-deploy the applicant on an alternative assignment.¹⁶⁰ Therefore, it will be difficult to establish that the LHF's decision was unfair where the employment contract is well drafted and permits the LHF to dismiss the LHE upon the host's request; and the LHF demonstrates that it has no further need to re-assign the LHE.¹⁶¹

(b) *The Host's Decision, even if Unfair, is Largely Irrelevant*

The question then becomes whether the *host's* motivations are relevant in assessing whether the dismissal was unfair. It should be noted that there have been cases where the host has allegedly requested the termination of an assignment on the basis of an employee's union activities,¹⁶² pregnancy,¹⁶³ race,¹⁶⁴ incapacity due to an injury,¹⁶⁵ safety complaints,¹⁶⁶ inquiry into the reasons for non-promotion,¹⁶⁷ and refusal to clean a host Executive's coffee cup.¹⁶⁸

Tribunals have stated a normative preference for focusing the inquiry on the LHF's reason for the termination of the assignment.¹⁶⁹ In *Costello*,¹⁷⁰ the tribunal explained that it must focus on the conduct of the 'two parties to the actual employment relationship'.¹⁷¹ The fact that the

¹⁵⁶ See for instance: *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites). This may seem reasonable as a decision on these grounds would not seem to be 'capricious, fanciful, spiteful or prejudiced': see *Selvachandran v Peteron Plastics* (1995) 62 IR 371 at 373.

¹⁵⁷ See for instance: *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites); *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRComm 4102 (6 November 2004) (Commissioner A R Beech); *Mr Newman v Hahn Electrical Contracting Pty Ltd* [2003] AIRC 577 (25 March 2003) (Commissioner Whelan).

¹⁵⁸ *Fair Work Act 2009* (Cth) s 389.

¹⁵⁹ *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan).

¹⁶⁰ *Ibid* [31] - [39]. Note: In this case FWA did not have to address whether the unfair reasons of the host were relevant to assessing a genuine redundancy. The hosts' reasons were considered to be reasonable and no further analysis was given.

¹⁶¹ For a discussion of the difference a well-drafted contract may make in the context of determining if an employee-employer relationship exists see, Stewart, *Stewart's Guide to Employment Law*, above n 18, 50-1.

¹⁶² *Bruce Neilson, Lawrence Brookes, Andrew Wood, Robert Gore, Paul Bertram, Terry Clancy v JSM Trading Pty Limited t/a Workhire Pty Ltd* [2003] AIRC 682-7 (1 April 2003) (Senior Deputy President Kaufman).

¹⁶³ *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna).

¹⁶⁴ *Elena Misheva v Spicers Paper Ltd* [1996] AIRC 21189 (22 April 1996) (Senior Deputy President Marsh) under the Heading 'Written Submissions'.

¹⁶⁵ *Jason Craig Warburton v Challenge Recruitment* [2002] AIRC 913793 (1 February 2003) (Senior Deputy President Williams); *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004) (Deputy President PJ Hampton).

¹⁶⁶ *Arthur Cowl v Steelweld Personnel Pty Ltd* [1997] WAIRComm 95 (13 May 1997) (Commissioner J. F. Gregor).

¹⁶⁷ *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRComm 62 (23 July 1998) (Deputy President P. Hampton).

¹⁶⁸ *Ms Jacinta Arcadia v Accenture Australia* [2008] AIRC 359 (5 February 2008) (Vice President Watson) [16].

¹⁶⁹ See for instance *De Bono v Davids Staffing Solutions* [2002] AIRC 332 (3 May 2002) (Commissioner Whelan) [46]; *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004) (Deputy President PJ Hampton) [154]-[155].

¹⁷⁰ *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004) (Deputy President PJ Hampton).

¹⁷¹ *Ibid* [153].

'employment relationship' was conducted 'in the context of the applicant being provided' by the LHF to the host was not seen to justify an assessment of the host's reasons in substitution for the LHF's.¹⁷² The host remained a third party to the employment relationship.¹⁷³

Tribunals have, however, differed as to the *extent* that the host's motivations are relevant. In some cases the tribunal has simply viewed the host's reasons as unfair but irrelevant. For instance, in *De Bono*,¹⁷⁴ the tribunal stated that it is not a 'matter within the jurisdiction of this Commission' to determine whether the decision of the host was valid.¹⁷⁵ Paradoxically the tribunal also accepted that the assignment was effectively terminated by the decision of the host.¹⁷⁶ Similarly, in *Costello*¹⁷⁷ the tribunal accepted that the LHF had 'dismissed the applicant because of the fact that [the host] no longer sought that the applicant be supplied'.¹⁷⁸ And yet the tribunal noted the reasons given by the host for termination of the assignment would be invalid if the host were the employer.¹⁷⁹

In *Euvrard*¹⁸⁰ and *Thompson*,¹⁸¹ the AIRC and WAIRC respectively refined this principle. In *Euvrard*¹⁸² the AIRC held that if the employment contract empowered the LHF to dismiss the applicant where the host so instructs, then a decision taken on this basis would be valid.¹⁸³ However, where the employment contract does not provide for a dismissal on these grounds, then the LHF will need to resort to some other justification.¹⁸⁴ This was the case in *Thompson*,¹⁸⁵ where the LHF sought to justify the dismissal by reference to the reasons given by the host – that the applicant sent inappropriate emails in breach of a host policy.¹⁸⁶ The tribunal did not accept this reason as sufficient to justify a summary dismissal.¹⁸⁷ Together these decisions provide some scope for an assessment of the host's reason for the termination, but only if the LHF adopts these reasons in order to justify a dismissal.

The AIRC adopted a similar approach in *Newman*,¹⁸⁸ indicating that the LHF's decision to dismiss the applicant at the host's request would only be valid if the host had a contractual right to order the dismissal of a *particular* employee.¹⁸⁹ In this case, no contractual right was established, and the tribunal questioned whether the LHF should have complied with the host's

¹⁷² Ibid [155].

¹⁷³ Ibid.

¹⁷⁴ *De Bono v Davids Staffing Solutions* [2002] AIRC 332 (3 May 2002) (Commissioner Whelan).

¹⁷⁵ Ibid [46].

¹⁷⁶ Ibid.

¹⁷⁷ *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004) (Deputy President PJ Hampton).

¹⁷⁸ Ibid [158].

¹⁷⁹ Ibid [148].

¹⁸⁰ *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites).

¹⁸¹ *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102 (6 November 2004) (Commissioner A R Beech).

¹⁸² *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites).

¹⁸³ Ibid. Note: no paragraph numbers are provided for this decision.

¹⁸⁴ *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102 (6 November 2004) (Commissioner A R Beech) [50]-[52].

¹⁸⁵ Ibid.

¹⁸⁶ Ibid [57].

¹⁸⁷ Ibid [63].

¹⁸⁸ *Mr Newman v Hahn Electrical Contracting Pty Ltd* [2003] AIRC 577 (25 March 2003) (Commissioner Whelan).

¹⁸⁹ Ibid [59]. The AIRC distinguished this case from *Euvrard and Black Star Holdings*, where pursuant to the contract between the host and LHF, the host could select a particular employee to remove from site, [36].

request to dismiss Mr Newman.¹⁹⁰ The AIRC accepted the host needed to reduce its workforce, yet the request to dismiss Mr Newman was ‘unreasonable’, given he was the best electrician on-site.¹⁹¹ The LHF conceded that the host’s request was unreasonable and that others should have been selected for dismissal.¹⁹² The tribunal thus rejected the LHF’s argument that ‘the [host’s] unreasonable direction’ was a valid reason for the dismissal.¹⁹³

Alternatively, the AIRC in *Workhire*¹⁹⁴ held that the LHF must have conspired with the host in the improper purpose in order for the host’s motivations to be relevant.¹⁹⁵ In *Workhire*¹⁹⁶ the host dismissed 14 LHEs due to a purported downturn in work, and yet soon afterwards all non-union employees were re-engaged.¹⁹⁷ The tribunal speculated that the ‘applicants’ so called union activities were an opportunistic reason for their non re-engagement’; yet this was irrelevant in determining whether the dismissal was unfair as there was no ‘conspiracy’.¹⁹⁸

Finally, *Oanh*¹⁹⁹ raised a more applicant-friendly approach. The host was found to be the employer, but the tribunal noted that, if it were wrong and the LHF ‘was the employer then it is ... vicariously accountable for the applicant’s harsh, unreasonable and unjust dismissal’ by the host.²⁰⁰ This decision was made even though the LHF protested it ‘did not have the power to [influence or] overturn the decisions of the client’.²⁰¹ The notion of vicarious liability was also raised in *Fary*;²⁰² however the SAIRC did not have to determine this issue as the dismissal was found to be unfair on procedural grounds.²⁰³ If adopted by a future tribunal, this approach would extend the scope of a LHF’s vicarious liability for LHE’s welfare.²⁰⁴

(c) Problems in Establishing Responsibility for Procedural Fairness

An alternative avenue is to challenge the procedural aspect of the dismissal. In assessing procedural fairness, tribunals focus on the LHF’s procedural conduct. In turn, a key issue is *how much* leeway should be given to LHF’s where they claim to exercise ‘almost no control over the client’s decisions’ and have ‘no choice but to go along with the client’.²⁰⁵ This ‘helplessness’ stems from the contract between the LHF and host, which often gives the host the contractual

¹⁹⁰ Ibid.

¹⁹¹ Ibid [5] and [25].

¹⁹² Para [51]-[52] and [58].

¹⁹³ Para [53].

¹⁹⁴ *Bruce Neilson, Lawrence Brookes, Andrew Wood, Robert Gore, Paul Bertram, Terry Clancy v JSM Trading Pty Limited t/a Workhire Pty Ltd* [2003] AIRC 682-7 (1 April 2003) (Senior Deputy President Kaufman).

¹⁹⁵ Ibid [32].

¹⁹⁶ Ibid.

¹⁹⁷ Ibid [1]-[5].

¹⁹⁸ Ibid [35].

¹⁹⁹ *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna).

²⁰⁰ *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services* [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna) [77].

²⁰¹ Ibid [77].

²⁰² *Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRCComm 24 (31 March 2003) (Commissioner JK Lesses).

²⁰³ Ibid [10].

²⁰⁴ Lexis Nexis, *Halsbury’s Laws of Australia* (online) (at 11 August 2006) Tort, ‘Vicarious Liability’ [65-1950]. Current vicarious liability for employee’s welfare is statute based in the areas of OHS and Anti-Discrimination: Lexis Nexis, *Halsbury’s Laws of Australia* (online) (at 22 May 2006) Contract of Employment, ‘Employer’s Statutory Liability to Ensure Against Injury to Employees’ [165-1070]; Australian Human Rights Commission, *Employer Responsibilities: A Guide to Vicarious Liability* (12 January 2010) <http://www.hreoc.gov.au/info_for_employers/employer_respons/index.html>.

²⁰⁵ *Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRCComm 24 (31 March 2003) (Commissioner JK Lesses) [12]-[14].

right to send a LHE away at any time.²⁰⁶ Indeed such contractual provisions essentially provide an often-successful defence for the LHF, in spite of the usual 'principle that it should not be lawful to contract out of protective regulation'.²⁰⁷

Nevertheless, at times, LHF's assertion that they are 'helpless messenger[s]' has been accepted at face value, and thus a very low standard of procedural fairness has been viewed as 'fair'.²⁰⁸ Indeed in *Workhire*²⁰⁹ both parties agreed that the LHF had 'no alternative other than to lay off the applicants with 'virtually no notice' following notification from the host that 'it required ... fewer scaffolders' from the following day'.²¹⁰ Similarly in *De Bono*,²¹¹ the Commission noted:

It is in the nature of labour hire arrangements that frequently the employer has no influence over whether or not a client uses a particular employee or refuses to use a particular employee. In this case the applicant's assignment with Australia Post was terminated by a decision of the client.²¹²

In other, contrasting decisions, tribunals have actively assessed the extent to which the LHF is powerless to influence the procedure adopted.²¹³ Factors considered relevant to this assessment have been the contractual arrangements under which the LHF operates and any practical limitations on action by the LHF.²¹⁴ For example, in *Euvrard*,²¹⁵ the tribunal accepted that all the LHF could do in the circumstances was to discuss the situation with both the applicant and host.²¹⁶ The tribunal did not accept that the LHF was required to challenge the decision of the host 'in a substantive way'; rather the tribunal accepted that the LHF was contractually obliged to remove the employee from the site and that they 'couldn't have forced the applicant onto the site' as '[a]part from anything else, [the host] controlled the plane that flew onto the [work]site'.²¹⁷ In *Costello*,²¹⁸ the SAIRC felt there was no utility in the LHF

²⁰⁶ See the discussion of contractual arrangements in Section II.

²⁰⁷ Stewart, 'Redefining Employment?', above n 11, 42, citing cases *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213, 1222; *R v Allan*; *Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237, 247.

²⁰⁸ See for instance *Bruce Neilson, Lawrence Brookes, Andrew Wood, Robert Gore, Paul Bertram, Terry Clancy v JSM Trading Pty Limited t/a Workhire Pty Ltd* [2003] AIRC 682-7 (1 April 2003) (Senior Deputy President Kaufman) [6]-[8]; *Mr M v LD Pty Ltd* [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan) [37].

²⁰⁹ *Bruce Neilson, Lawrence Brookes, Andrew Wood, Robert Gore, Paul Bertram, Terry Clancy v JSM Trading Pty Limited t/a Workhire Pty Ltd* [2003] AIRC 682-7 (1 April 2003) (Senior Deputy President Kaufman).

²¹⁰ *Ibid* [6]-[8].

²¹¹ *De Bono v Davids Staffing Solutions* [2002] AIRC 332 (3 May 2002) (Commissioner Whelan).

²¹² *Ibid* [46].

²¹³ *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRCComm 13 (29 March 2004) (Deputy President PJ Hampton); *Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRCComm 24 (31 March 2003) (Commissioner JK Lesses); *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102 (6 November 2004) (Commissioner A R Beech); *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites); *Mr Newman v Hahn Electrical Contracting Pty Ltd* [2003] AIRC 577 (25 March 2003) (Commissioner Whelan); *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRCComm 62 (23 July 1998) (Deputy President P. Hampton).

²¹⁴ See for instance, *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites); *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRCComm 13 (29 March 2004) (Deputy President PJ Hampton).

²¹⁵ *Graeme H. Euvrard and Black Star Holdings Pty Ltd t/as Rotary Drilling Services* [1998] AIRC 80061 (12 October 1998) (Senior Deputy President Polites).

²¹⁶ *Ibid*. Note: There are no numbered paragraphs for this decision.

²¹⁷ *Ibid*.

²¹⁸ *Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRCComm 13 (29 March 2004) (Deputy President PJ Hampton).

providing an opportunity for the LHE to discuss with the host their reasons for terminating the assignment, as there was no chance the host would re-engage the LHE.²¹⁹

Finally, in *Fary*²²⁰ and *Thompson*,²²¹ the SAIRC and WAIRC respectively placed a strong emphasis on the LHF's duty to 'take control' and be an 'advocate' for the LHE where the host wishes to terminate the assignment. In *Fary* the SAIRC noted that the LHF's acceptance of a 'relegated status ... ignored the fact that [their] company was bound' to 'exercise due diligence in the interest of the applicant'.²²² The tribunal emphasised that even if the host initiated the outcome, the LHF 'had implemented the decision', and so bore responsibility for failing to *recommend* a fair procedure to be implemented.²²³ The applicant was on all accounts an excellent employee, but had been made redundant because he had suffered bullying and harassment by other workers.²²⁴ It is unclear whether the LHF would have discharged their obligations if it had recommended a fair procedure which the host rejected. *Thompson*²²⁵ reached a similar conclusion: the LHF had shown 'little if any loyalty towards [the applicant] at the time' of her summary dismissal.²²⁶ Indeed, the Commission rejected the purported 'inability' of the LHF to intervene to prevent an unjustified summary dismissal – whether the LHF was contractually compelled to terminate the assignment, the firm *did* have a choice whether to give effect to a summary dismissal without notice.²²⁷ Furthermore, the WAIRC characterised as unfair the LHF's failure to independently investigate the situation and their complete reliance on the allegations of the host as to the applicant's conduct.²²⁸ The decisions in *Fary* and *Thompson* pave the way for a more critical assessment of the extent of the LHF's 'helplessness' in influencing the dismissal procedure. Nevertheless, underlying these decisions is still an acceptance that employer obligations may be mitigated through commercial arrangements with the host - a third party to the employment relationship.²²⁹

IV. CONCLUSION

A labyrinth of conflicting tribunal approaches characterises unfair dismissal claims made by LHEs against LHF's. It is *possible* that the stars will align for a LHE.²³⁰ A tribunal may decide that the LHF has not done enough to secure an alternative placement for the LHE; or instead accept that the employment relationship — as it *developed* between the parties — has ended at the

²¹⁹ *Ibid.*

²²⁰ *Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRCComm 24 (31 March 2003) (Commissioner JK Lesses).

²²¹ *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102 (6 November 2004) (Commissioner A R Beech).

²²² *Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRCComm 24 (31 March 2003) (Commissioner JK Lesses) [24]-[27].

²²³ *Ibid* [33].

²²⁴ *Fary v Clements Techforce Pty Ltd* [2002] SAIRCComm 7 (19 February 2002) (Commissioner JK Lesses) [17]-[23].

²²⁵ *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102 (6 November 2004) (Commissioner A R Beech).

²²⁶ *Ibid* [68].

²²⁷ *Ibid* [63].

²²⁸ *Ibid* [63].

²²⁹ Contrary to the positions in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213, 1222; *R v Allan; Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237, 247.

²³⁰ Examples are: *Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRCComm 24 (31 March 2003) (Commissioner JK Lesses); *Jeanette Melbourne v JC Techforce Pty Ltd* [1998] SAIRCComm 62 (23 July 1998) (Deputy President P. Hampton); *Rebecca Thompson v Brunel Energy Pty Ltd* [2001] WAIRCComm 4102 (6 November 2004) (Commissioner A R Beech).

LHF's initiative. So too, might a tribunal decide that the LHF's decision to dismiss the LHE on the host's instructions is in substance unfair as the contract did not oblige the firm to do so; or that the LHF needed to be a stronger advocate for the LHE and strive to ensure that a fair procedure was adopted by the host. Or, the tribunal could develop the doctrine of vicarious liability to make LHF's responsible for the unfair decision of the host, or decide that the LHF conspired with the host in their 'unfair' decision.

But existing decisions suggest that more often the LHE's claim will fall down on the basis that they have not been dismissed or that the LHF's decision to dismiss them was not unfair. The triangular relationship serves to reduce the LHF's accountability for the termination of the assignment, while at the same time denying the possibility that this accountability-gap can be filled by focusing on the decision and conduct of the host.²³¹ The prospects for a LHE's unfair dismissal claim appear to be demonstrably bleak, particularly if the conclusions of this article are combined with existing literature that demonstrates the near insurmountable challenges of lodging an unfair dismissal claim against the host.²³²

In summary, unfair dismissal laws fail to provide LHEs with effective redress where they have lost access to their livelihood in circumstances that are substantively or procedurally unfair. The protection otherwise offered by unfair dismissal laws is substantially diminished under labour-hire arrangements. This matters because '[w]ork relations are of fundamental importance to the daily lives of most people'.²³³ Unfair dismissal laws were introduced owing to this recognition and should remove 'feelings of insecurity for workers who realise that they could [otherwise] be dismissed at any time for no reason'.²³⁴

²³¹ Underhill and Rimmer, above n 3, 174-5.

²³² Pittard and Naughton, above n 11, 136-8; Anderson, Archer and Smiljanic, above n 12, 19-21; Stewart, *Stewart's Guide to Employment Law*, above n 18, 64, noting that cases where the host has been made a respondent are 'the exception rather than the rule'.

²³³ Fenwick, above n 11, 261.

²³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 1 (Julia Gillard, Minister for Employment and Workplace Relations) 7.

V. BIBLIOGRAPHY

A *Articles/Books/Reports*

Burgess, John, Erling Rasmussen and Julia Connel, 'Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net' (2004) 29 *New Zealand Journal of Employment Relations* 25

Campbell, Iain, Ian Watson and John Buchanan, 'Temporary agency work in Australia (Part I)' in John Burgess and Julia Connell (eds), *International Perspectives on Temporary Agency Work* (Routledge, 2004) 129

Chapman, Anna, 'The Decline and Restoration of Unfair Dismissal Rights' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the WorkChoices Legacy* (The Federation Press, 2009) 207

Collins, Hugh, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353

Creighton, Breen and Andrew Stewart, *Labour Law* (The Federation Press, 4th ed, 2005)

Cullen, Rohen, 'A Servant and Two Masters? – The Doctrine of Joint Employment in Australia' (2003) 16 *Australian Journal of Labour Law* 1

Curran, Simon, 'When is a Duck not a Duck? The Employee/Independent Contractor Dichotomy' (2004) *Law Society Bulletin* 24

Fenwick, Colin, 'Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry' (1992) 5(3) *Australian Journal of Labour Law* 237

Johnstone, Richard and Mark Quinlan, 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence From Australia' (September 2005, Working Paper 38, National Research Centre for OHS Regulation)

Owens, Rosemary and Joellen Riley, *The Law of Work* (Oxford University Press, 2007)

Pittard, M J and Richard B Naughton, *Australian Labour Law: Text, Cases & Commentary* (Lexis Nexis Butterworths, 2010)

Royal Commission on Trade Unions and Employers' Associations, 1965 - 1968, Chairman Rt. Hon. Lord Donovan (Cmnd. 3623, London, H.M.S.O. 1968)

Riley, Joellen, 'A Fair Deal for the Entrepreneurial Worker? Self Employment and Independent Contracting Post Work Choices' (2006) 19 *Australian Journal of Labour Law* 246

Stewart, Andrew, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 1

Stewart, Andrew, *Stewart's Guide to Employment Law* (The Federation Press, 2nd ed, 2009)

Underhill, Elsa and Malcolm Rimmer, 'State Protection for Temporary Agency Workers: Australian Developments' in Roger Blanpain (eds), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (Kluwer Law International, 2009) 173

B Cases

Advanced Australian Workplace Solutions Pty Ltd P Fox v Kangan Batman [1999] AIRC PRS0253 (25 October 1999) (Justice Giudice, Vice President McIntyre, Commissioner Redmond)

Application by DJ Porter for an Inquiry into an Election in the Transport Worker's Union of Australia (1989) 34 IRC 179

Arthur Cowl v Steelweld Personnel Pty Ltd [1997] WAIRComm 95 (13 May 1997) (Commissioner J. F. Gregor)

Bruce Neilson, Lawrence Brookes, Andrew Wood, Robert Gore, Paul Bertram, Terry Clancy v JSM Trading Pty Limited t/a Workhire Pty Ltd [2003] AIRC 682-7 (1 April 2003) (Senior Deputy President Kaufman)

Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB 647

Damevski v Giudice (2003) 202 ALR 494

De Ann Polkinghorne v Telus Pty Ltd [2000] AIRC T3741 (27 November 2000) (Commissioner Deegan)

De Bono v Davids Staffing Solutions [2002] AIRC 332 (3 May 2002) (Commissioner Whelan)

Elena Misheva v Spicers Paper Ltd [1996] AIRC 21189 (22 April 1996) (Senior Deputy President Marsh)

Fary v Clements Techforce Pty Ltd [2002] SAIRComm 7 (19 February 2002) (Commissioner JK Lesses)

Fary v Clements Techforce Pty Ltd (Appeal) [2002] SAIRComm 56 (30 September 2002) (President Judge WD Jennings, Commissioner MGG McCutcheon, Commissioner AJ Dangerfield)

Fary v JCTF Pty Ltd Formerly Trading As Clements Techforce [2003] SAIRComm 24 (31 March 2003) (Commissioner JK Lesses)

Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 WLR 1213

Franks v Reuters Ltd & First Resort Employment Ltd [2003] EWCA Civ 417

G Stuart v G P R Engineering [1999] AIRC 8479 (27 August 1999) (Commissioner Raffaelli)

Jane Savage v Department of Education [2004] AIRC 947727 (7 June 2004) (Commissioner Foggo)

Jason Craig Warburton v Challenge Recruitment [2002] AIRC 913793 (1 February 2003) (Senior Deputy President Williams)

Jeanette Melbourne v JC Techforce Pty Ltd [1998] SAIRComm 62 (23 July 1998) (Deputy President P. Hampton)

Jennifer Ethel Isaacs v Kelly Services (Australia) Limited [2005] AIRC 1829 (22 April 2005) (Deputy President McCarthy)

Kevin John Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd [2004] SAIRComm 13 (29 March 2004) (Deputy President PJ Hampton)

Kwee-Sang Choong v Bridgestone Australia Limited [2008] AIRC 980932 (29 February 2008) (Senior Deputy President O'Callaghan)

Licensed Clubs of Victoria v Higgins (1988) 30 AILR 497

Mann v Capital Territory Health Commission (1981) 54 FLR 23

Martin Healey v Targaze Pty Ltd T/A Intergrated Workforce [1997] WAIRComm 1439 (21 February 1997) (Commissioner A. R. Beech)

Mr Charles Fitzpatrick v Roads Corporation [2007] AIRC 977769 (25 July 2007) (Commissioner Grainger)

Mr M v LD Pty Ltd [2009] FWA 11601 (22 December 2009) (Senior Deputy President O'Callaghan)

Mr Newman v Hahn Electrical Contracting Pty Ltd [2003] AIRC 577 (25 March 2003) (Commissioner Whelan)

Mr Stephen O'Loughlin v APS Group (Placements) Pty Ltd [2009] FWA 7367 (24 September 2010) (Commissioner Cambridge)

Ms Jacinta Arcadia v Accenture Australia [2008] AIRC 359 (5 February 2008) (Vice President Watson)

Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Thiess Services Pty Ltd t/as Thiess Services [2003] NSWIRComm 1006 (3 March 2003) (Commissioner McKenna)

R v Allan; Ex parte Australian Mutual Provident Society Ltd (1977) 16 SASR 237

Rebecca Thompson v Brunel Energy Pty Ltd [2001] WAIRComm 4102 (6 November 2004) (Commissioner A R Beech)

R. Maloney v Bramley Services t/as National Manufacturing Recruitment [2002] AIRC 7766 (7 March 2002) (Commissioner Eames)

Smith v Director-General of School Education (1993) 31 NSWLR 349

Selvachandran v Peteron Plastics (1995) 62 IR 371

William Hill Organisation Ltd v Tucker [1999] ICR 291

Yan Xu v Skilled Engineering Ltd [1998] AIRC 30014 (26 May 1998) (Senior Deputy President Watson, Deputy President Duncan and Commissioner Hingley)

C Legislation

Fair Work Act 2009 (Cth)

Workplace Relations Amendments (Work Choices) Act 2005 (Cth)

D Treaties

Termination of Employment Convention, 1982 (No. 158) opened for signature 22 June 1982,
ATS 1994 No. 4 (entered into force 23 November 1985) art 3 (ILO Convention 158)

E Other

A. D. Frazer, 'Labour Law and Productive Decentralisation: Australian Report' (Report, XVIII
World Congress of Labour and Social Security Law, 5-8 September 2006)

Anderson, Jen, Toby Archer and Vera Smiljanic, Submission No 9 to the Economic
Development Committee, *Inquiry into Labour Hire Employment in Victoria*, 19 December 2003

Australia Bureau of Statistics, 'Forms of Employment Survey' (Cat. No. 6359.0, November
2001)

Australia Bureau of Statistics, 'Forms of Employment' (Cat. No. 6359.0, November 2009)

Australian Human Rights Commission, *Employer Responsibilities: A Guide to Vicarious
Liability* (12 January 2010)

<http://www.hreoc.gov.au/info_for_employers/employer_respons/index.html>

Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008 (Julia
Gillard, Minister for Employment and Workplace Relations)

Dr Linda Brennan, Dr Michael Valos and Professor Keven Hindle, 'On-Hired Workers in
Australia: Motivations and Outcomes' (RMIT Occasional Research Report, December 2003)

Economic Development Committee, Joint-Committee, *Final Report: Inquiry into Labour Hire
Employment in Victoria* (June 2005)

Explanatory Memorandum, Fair Work Bill 2008

G Stevens, *Report of the Review of the South Australian Industrial Relations System*
(Workplace Services Adelaide, 2002)

Justice P.R. Munro, 'Industrial Tribunals: Challenges and Opportunities' (Paper presented at Australian Industry Group National PIR Group Conference, 6 May 2002)

Lenny Roth, 'Industrial relations update: The referral of powers and the Fair Work Act 2009' (E-Brief No 2/10, Parliamentary Library, NSW, January 2010)

Lexis Nexis, Halsbury's Laws of Australia (online) (at 22 May 2006) Contract of Employment, 'Employer's Statutory Liability to Ensure Against Injury to Employees' [165-1070]

Lexis Nexis, Halsbury's Laws of Australia (online) (at 22 May 2006) Employment, Employer's Obligations, 'Provision of Work' [165-380]

Lexis Nexis, Halsbury's Laws of Australia (online) (at 11 August 2006) Tort, 'Vicarious Liability' [65-1950]

New South Wales Government, Submission No 35 to the Standing Committee on Employment, Workplace Relations and Workforce Participation, *Inquiry into Independent Contractors and Labour Hire Arrangements*, 11 March 2005

Patrick Laplagne, Maurice Glover and Tim Fry, 'The Growth of Labour Hire Employment in Australia Report' (Productivity Commission Staff Working Paper, February 2005)

Sean Selleck, *Labour Hire – Why it is not as Simple as You May Think* (June 2003) Specialist News, Workplace Express <

<http://www.ecruiting.com.au/express/200306/04selleckspeech.htm>>

Standing Committee on Employment, Workplace Relations and Workforce Participation, House of Representatives, *Inquiry into Independent Contractors and Labour Hire Arrangements* (August 2005)

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