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 Brian Francis Ward  
 Sharon Ann Winn

**Consultants**

Maxwell Roy Lockhart  
 William Hamilton Hart (Notary Public)

**Senior Associates**

Katharine Patricia Philp  
 Gail Maree Black

14 January 2003

**Partner:** Brian Ward Ph: (07) 3233 1243  
**Email:** bforward@flowerhart.com.au  
**Our ref:** BFW:220947  
**Your ref:**

**Private & Confidential**

The Most Reverend Dr P Aspinall  
 Archbishop of Brisbane  
 Anglican Diocese of Brisbane  
 GPO Box 421  
 BRISBANE QLD 4001

Dear Archbishop,

**MR GILBERT CASE**

I refer to your letter to the abovenamed which I understand was delivered on 24 December last calling upon Mr Case to respond in writing to the allegations in the statement of Mr Graham Thomson by 16 January 2003.

In Robert Cunningham's absence on leave and at his request I thought it may be useful to record for your consideration upon your return on 16 or 17 January next what options I see are available upon the receipt of Mr Case's response to Mr Thomson's allegations and my recommendation.

However before doing so, I set out a general consideration of the issues:

***Facts and Circumstances***

- (a) Mr Case was initially employed by the Diocese some 24 years ago as headmaster at St Paul's School.
- (b) In June 2000 Mr Case was appointed the Executive Director of the Anglican Schools Office. The terms of his appointment are set out in his employment agreement with the Diocese dated 28 June

**Address**

Level 19, National Bank House  
 Creek & Adelaide Streets  
 Brisbane, Australia  
 GPO Box 219, Brisbane 4001  
 DX 144

**Telephone****(07) 3233 1233****Email**

flowerhart@flowerhart.com.au

**Facsimile**

(07) 3229 4555

**Web Site**<http://www.flowerhart.com.au>

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2000 (the Agreement). The relevant provisions of the Agreement can be summarised as follows:

- (i) The Term is for a period of 5 years commencing on 6.2.2001;
- (ii) Pursuant to Clause 2(b) of the Agreement, the Diocese may terminate the Agreement if Mr Case is guilty of serious misconduct which is defined to include "wilful neglect or gross negligence", "serious incompetence or inefficiency", "disobedience or neglect of any lawful order or direction" and "the commission of any criminal offence";
- (iii) Clause 2(d) of the Agreement provides as follows:  
  
"Save for the matters referred to in Clause 2(b) of this Agreement, the Diocese may not terminate this Agreement unless it shall first give the employee not less than three (3) months notice in writing;
- (iv) Clause 2(e) of the Agreement provides as follows:-  
  
"The Employee may terminate this Agreement by giving the Diocese not less than one (1) months notice in writing";
- (v) Mr Case's current salary is in the order of \$130,000 and he is not employed pursuant to any industrial award or certified agreement.

Mr Graham Thomson (Mr Thomson), the headmaster of Brisbane Boys College from 1974 to 1989 has provided a written statement in which he records a telephone conversation with Mr Case in 1980 when Mr Case was Headmaster at St Pauls. A Gregory Knight (formerly a teacher at BBC) applied for a position at St Pauls and Mr Thomson was requested by Mr Case to provide the background of why Knight had left BBC. Mr Thomson states as follows:

"At the time of that telephone conversation the details of the allegations against Knight were clear in my mind. I made it clear to Mr Case that Knight had been discharged from BBC on the grounds of irregular conduct in his attitude towards the boys.

I definitely gave Mr Case reasons for Knight's discharge. The reasons were probably given in more general terms than in particular detail.

I told Mr Case that Knight had made no attempt to defend himself.

I heard later that St. Paul's had appointed Knight. I recall that I was surprised at Mr Case's decision."

- (c) Based on the allegations in Mr Thomson's statement notice has been given to Mr Case inviting him to respond in writing to the allegations by 16.01.2003. At this stage the notice to Mr Case is on the basis that it was an implied term of his current employment that he was a fit and proper person to occupy the position of Executive Director of the Anglican Schools Office and that term has now been found to be incorrect in view of Mr Thomson's allegations.

### **Legal Position**

Assuming the Diocese takes the position to terminate Mr Case's employment, an employee upon termination has various remedies available to him if he alleges that the termination was harsh, unjust or unreasonable or occurred when no reasonable notice of termination was given.

- (i) **Access to Queensland Industrial Relations Commission**

An employee whose employment is terminated in circumstances which are found to be harsh, unjust or

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unreasonable can make application to the Queensland Industrial Relations commission for reinstatement to his former position and/or compensation for the unfair dismissal.

The remedies of reinstatement or compensation are excluded in cases where the contract of employment is for a fixed term or the employee's salary is in excess of approximately \$75,000 per year.

Mr Case's contract of employment is expressed to be a fixed term contract (5 year term) but because of the effect of clauses 2(d) and 2(e) which we have quoted above, the Courts do not regard a contract with the right of either party to determine on notice as a fixed term contract.

Further, his salary is to the order of \$130,000 per year and for that reason alone he does not have access to the Commission.

(ii) **Position at common law**

If Mr Case decided to complain about the termination of his employment, his only rights would be to take issue with the Diocese by the institution of proceedings in either the Supreme or District Courts claiming damages for unfair dismissal. At Common Law the concept of reinstatement does not apply and the only consideration to be taken into account by the Courts is what was reasonable notice of termination in the particular instance.

Unlike the position that exists in the Industrial Commissions, notice periods in contracts of employment are recognised at Common Law. The Industrial Commissions do not have regard to agreed notice periods but decide whether the termination was harsh, unjust or unreasonable and award reinstatement and/or compensation accordingly.

Under the agreement with Mr Case, the Diocese pursuant to clause 2(d) has, in our view, the right to terminate the agreement upon the giving of three months notice in writing.

The agreement is not particularly well drawn and the qualification at the commencement of clause 2(d):

"Save for the matters referred to in clause 2(b) of this Agreement"

may give the inference that the termination which is contemplated by clause 2(d) can only occur if there is some other reason for termination.

However, we consider that a better interpretation is gleaned from a consideration of clause 2(a) of the Agreement which provides as follows:

"Subject to clause 2(b) of this Agreement and clause 10 of the schedule the term of this Agreement shall be for a period of 5 years commencing on 6 February 2001 and concluding on 5 February 2006".

The drafting of the Agreement should have taken into account the provisions of clauses 2(d) and 2(e) (which are the respective notices by the employer and the employee to terminate) as well as the provisions of clause 2(b) which relate to termination for serious misconduct. Taking that into consideration we are of the view that clause 2(d) can be read that the Diocese may give 3 months notice in writing of termination without ascribing a reason therefor.

This view is supported by the fact that the employee is given a right of termination under clause 2(e) which is unfettered.

Even if this was not found to be the correct interpretation the reality is that the Agreement is not a fixed term contract of employment (because of the provisions of clause 2(d) and 2(e)). Mr Case would be most unlikely to simply recover by way of damages against the Diocese his salary for the balance of the unexpired term of his contract. The Court would determine what is reasonable notice of termination given his period of service, age and salary. A "ball park" figure would be 12 months salary.

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### **Scenario 1**

#### Mr Case confirms Mr Thomson's allegations

It would be open for the Diocese to terminate Mr Case's employment.

Mr Case would be entitled to payment of all accrued entitlements by way of salary, annual leave, long service leave or superannuation. I assume it is not part of Mr Case's employment arrangements that he is entitled to be paid out for any accumulated sick leave upon a termination of employment.

Mr Case has been employed by the Diocese in for over twenty years and the question arises as to whether he is entitled to any notice of termination which would involve the payment to him of salary equivalent to the period of notice.

Leaving aside the 3 months notice in clause 2(d) of the Agreement, it is arguable in this instance that the misconduct on the part of Mr Case is so serious that he is not entitled to any notice of termination. The Diocese however may take the view that it is prepared to make payment to him of an ex gratia amount in view of the service of over twenty years to the Diocese. I would be pleased to discuss with you the amount of the extra gratia payment if this view is taken.

The Diocese however could simply give 3 months notice of termination pursuant to clause 2(d) by payment of 3 months salary in lieu.

The Diocese, in this instance, can rely on the breach by Mr Case of the implied term in the Agreement as referred to in your Notice to Mr Case of 24/12/2002.

### **Scenario 2**

#### Mr Case denies the allegations in Mr Thomson's statement arguing either that Mr Thomson did not give the advices he claims or the advices were such that it did not amount to a warning as to Knight's future employment.

The Diocese would need to consider carefully Mr Case's response in the light of Mr Thomson's allegation and make a decision as to whether on the balance of probabilities there has been a breach by Mr Case of his contract of employment.

Assuming that the Diocese does decide to accept Mr Thomson's version of the matter, it would be open for the Diocese to terminate Mr Case's employment. Again, Mr Case would be entitled to receive payment of all accrued entitlements by way of salary, annual leave, long service leave, superannuation and any accumulated sick pay if it was a term of his employment that it be paid out on termination.

The Diocese could rely on the 3 months notice of termination in clause 2(d). To proceed with a termination pursuant to the implied term argument may be risky as it provides Mr Case with the opportunity to challenge the reason (breach of implied term) for termination.

### **Recommendation**

If you decide to proceed against Mr Case I recommend that the Diocese rely upon the termination provisions as set out in clause 2(d) of the Agreement. As I have indicated, Mr Case has no access to the Industrial Commissions and therefore he is not in a position to obtain an order for reinstatement to his former position should the Diocese decide to terminate his employment.

Mr Case's rights upon termination of employment will exist only at Common Law and to pursue those rights he will need to institute proceedings in either the Supreme or District Courts seeking damages for unfair dismissal.

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Such proceedings at Common Law are onerous as the employee exposes himself to considerable legal costs in pursuing an action which may not come on for hearing for approximately 2 years.

In Supreme or District Court proceedings there are now quite extensive mediation procedures and if Mr Case did pursue the Diocese for damages for unfair dismissal the matter would proceed to mediation before a hearing in the Court.

The foregoing, as I have indicated, sets out an overview of the factual and legal position and identifies the options that I see are available to you in this matter.

I would be pleased to further discuss any aspect of my advice with you at any time.

Yours faithfully,

Brian Ward, Partner