District Court
New South Wales

Case Title:	Mitchell-Innes v Willis Australia Group Services Pty Ltd (No 2)
Hearing Date(s):	12 - 16 May; 5 - 8 August; 28, 29 October 2014
Decision Date:	8 December 2014
Jurisdiction:	Civil
Before:	P Taylor SC DCJ
Decision:	(1) Judgment in favour of the plaintiff against the first and second defendants in the sum of $296,650.75. (2) Dismiss the cross-claim. (3) Defendants to pay the plaintiff's costs. (4) Stay the entry of order (1) for two weeks, and thereafter until further order in the event that an application is made to correct an error in the calculation of the quantum of damages. (5) Stay entry of order (3) for two weeks, and thereafter until further order in the event that an application is made in respect of the proper costs order.
Catchwords:	CONTRACT - employment contract - termination of employment - breach - serious misconduct in serious circumstances - gross misconduct - intoxication - damages
Legislation Cited:	*Evidence Act 1995*, s 69, s 128, s 146, s 147 *Fair Work Act 2009* (Cth) Fair Work Regulations 2009 *Long Service Leave Act 1955*, s 4, s 12 Uniform Civil Procedure Rules 2005, r 36.1, r 42.1
Cases Cited:	*Barker v Commonwealth Bank of Australia*

[2012] FCA 942
Bostik (Australia) Pty Ltd v Gorgevski (No 1) (1992) 36 FCR 20
Brodie v Singleton Shire Council (2001) 206 CLR 512
Buitendag v Ravensthorpe Nickel Operations Pty Ltd [2012] WASC 425
Clouston & Co Ltd v Corry [1906] AC 122
Commonwealth Bank of Australia v Barker [2014] HCA 32
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64
Desmond Henry Randall v Aristocrat Leisure Limited (ACN 002 818 368) [2004] NSWSC 411
Drysdale v New Era Steamship Company Ltd (1936) 55 Ll.L.Rep. 45
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
Fox v Wood (1981) 148 CLR 438
Gooley v Westpac Banking Corporation (1995) 129 ALR 628
Hadley v Baxendale (1854) 2 CLR 517
Kearns v Glencore UK Limited [2013] EWHC 3697
Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285
McDonald v Parnell Laboratories (Aust) Pty Ltd [2007] FCA 1903
Murray Irrigation Ltd v Balsdon (2006) 67 NSWLR 73
New South Wales Cancer Council v Sarfaty (1992) 28 NSWLR 68
North v Television Corporation Ltd (1976) 11 ALR 599
Pacific Coal Pty Ltd; Ex parte CFMEU (2000) 203 CLR 346
Pepper v Webb [1969] 1 WLR 514
Peter Tao Zhu v Sydney Organising Committee for the Olympic Games & Ors [2001] NSWSC 989
Rankin v Marine Power International Pty Ltd [2001] VSC 150
Riverwood International Pty Ltd v McCormick (2000) 177 ALR 193
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357
Tasmania Development & Resources v Martin (2000) 97 IR 66
Transport Workers' Union of Australia v K &

	S Freighters Pty Ltd [2010] FCA 1225 *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 *Wise v Wilson* (1845) 1 CAR & K 981
Texts Cited:	M Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 36(3) UNSWLJ 1002
Category:	Principal judgment
Parties:	Donald Mitchell-Innes (plaintiff/cross-defendant) Willis Australia Group Services Pty Ltd (ACN 006 256 908) (first defendant/cross-claimant) Willis Australia Holdings Ltd (ACN 112 435 079) (second defendant)
Representation	
- Counsel:	Mr J H Pearce (plaintiff) Mr M Seck (defendants)
- Solicitors:	Paul Murphy and Associates Lawyers (plaintiff) Allens Linklaters (defendants)
File number(s):	2013/148638
Publication Restriction:	None

JUDGMENT

A. Introduction

1 The plaintiff, a senior employee of the first defendant, had his employment terminated on grounds related to him being intoxicated in the workplace. He sues for damages for wrongful dismissal.

B. Background and summary of conduct

2 Donald Mitchell-Innes has worked as an insurance broker for 24 years. He commenced employment with the first defendant, Willis Australia Group Services Pty Ltd, on 7 February 2004, and was appointed as its New South Wales General Manager on 11 April 2011. His duties included providing services to related companies in the Willis Group ("Willis").

3 Mr Mitchell-Innes was recognised by Willis on a number of occasions for his good service. He was granted bonuses and other monetary rewards in addition to salary. Some of those rewards were dependent on Mr Mitchell-Innes retaining his employment within Willis.

4 At the same time Mr Mitchell-Innes faced some challenges in the course of his employment. He was diagnosed with mild positional obstructive sleep apnoea in October 2006. He sought psychological help in 2012 to deal with cancer issues affecting his wife, and with the death of his mother and two of his closest friends from cancer. His alcohol consumption increased in 2011 and 2012.

5 In 2011 Mr Mitchell-Innes' immediate superior, Pieter Lindhout, then Chief Executive Officer for Willis Australasia, spoke to Mr Mitchell-Innes concerning a comment Mr Lindhout had received about Mr Mitchell-Innes' long lunches that included alcohol consumption. Either before or as a result of that meeting Mr Mitchell-Innes ceased the practice of long lunches that included alcohol consumption.

6 At the time alcohol consumption, in a work context, was not uncommon amongst employees of Willis in Australia. Employees were expected to socialise and consume alcohol with clients and prospective clients. Willis in Australia apparently routinely reimbursed alcohol expenses resulting from employee gatherings or entertaining clients.

7 At the time of Mr Lindhout's appointment in September 2011, Roger Wilkinson was the Chief Executive Officer of Willis in the Asia Pacific. Mr Wilkinson gave instructions to Mr Lindhout to follow the client's "*lead*" in relation to the consumption of alcohol. Mr Lindhout found that he was used to less alcohol consumption than the culture of Willis in Australia involved.

8 Mr Wilkinson was not a supporter of Mr Mitchell-Innes. On several occasions during 2012 Mr Wilkinson had told Mr Lindhout that he (Mr Wilkinson) wanted "*to get rid of Donald* [Mitchell-Innes]". In early October 2012 Mr Wilkinson was appointed to fulfil Mr Lindhout's role and thus became the immediate superior of Mr Mitchell-Innes.

9 Mr Mitchell-Innes attended a staff dinner in late October 2012 whilst in Melbourne for a Willis training conference. Most of those who attended the dinner visited the Irish Times Hotel for sometime after the dinner. Mr Mitchell-Innes and one or two other staff stayed at the hotel until the early hours of the next morning. Eventually Mr Mitchell-Innes and the other remaining staff member, Angela Usher, left the hotel. He accompanied her to the door of her hotel room then departed to his own room. He could not find his room key and after sitting down on a bench near the lifts, fell asleep. Shortly after 7am he was awakened, obtained a room key, and departed to his room to sleep.

10 At some stage around 8.30am, Mr Mitchell-Innes awoke, showered, dressed, ate some breakfast and attended the conference as an observer at about 9am. Ms Usher, although invited, did not attend. Some senior staff noticed that Mr Mitchell-Innes was not at his best. Mr Mitchell-Innes left the conference later that morning and met with Sherille Culvenor to work on budgets before returning to his accommodation. Mr Mitchell-Innes was asked by Mr Wilkinson later that day to return to Sydney. On 9 November, after an investigation conducted by Paul Cripps, the Human Resources Director for Australia and New Zealand at Willis, the

employment of Mr Mitchell-Innes was terminated as a result of his condition at the conference.

C. The employment contract

11 Whether the employment of Mr Mitchell-Innes was wrongfully terminated depends upon the terms of his employment contract. Provisions of the contract were contained in a letter ("the contract letter") signed by him on 19 September 2011. The relevant parts of the contract letter were as follows:

> *"19 September 2011*
>
> *...*
>
> *I have great pleasure in confirming your promotion to the full-time position of General Manager - New South Wales with the Willis Group.*
>
> *Your employer will be Willis Australia Group Services Pty Ltd ACN 006 256 908 (**Willis**) which is a wholly owned subsidiary of Willis Australia Holdings Ltd ACN 112 435 079.*
>
> *Your promotion will take effect from 1 April 2011...*
>
> ***Willis Group***
>
> *The Willis Group comprises the following companies and each of their related bodies corporate:*
>
> *Willis Australia Limited*
> *...*
>
> *During your employment with Willis you may be required to perform services for other companies in the Willis Group...*
>
> ***Duties***
>
> *Your duties will include those usually associated with the position to which you are appointed and those outlined in the position description provided. We may from time to time vary or modify your duties but only to those duties of which you have the skill and competence. We may also from time to time change your position title and reporting line if the*

operational requirements of the business deem this to be necessary.

As an employee of Willis you must also:

(a) serve Willis and the Willis Group faithfully and diligently and exercise all due care;

(b) act in the best interests of Willis and the Willis Group at all times;

(c) refrain from acting or giving the appearance of acting contrary to the interests of Willis and the Willis Group;

(d) use your best endeavours to promote and protect the good name and reputation of Willis and the Willis Group; and

(e) perform your duties to the best of your ability.

...

Remuneration

You will be paid remuneration and any employment benefits that Willis may make available provided that the total cost to Willis (including compulsory Superannuation contributions) does not exceed annually the Total Employment Cost specified in Schedule A attached.

The cash salary component of the Total Employment Cost will be paid monthly (on the 15th of each month or nearest preceding working day) by direct payment into a bank account nominated by you. Each pay represents two weeks pay in arrears and two weeks in advance.

Your remuneration includes all payments and benefits that we are legally obliged to provide to you. Your effective hourly rate of pay for hours worked is specifically off-set against and applied to any existing or newly-introduced payments or benefits to which you are or may become legally entitled, including but not limited to payment for all hours worked by you, allowances and annual leave loading, provided under or provided pursuant to any applicable award, agreement, legislation, order or determination.

In addition to the Total Remuneration Cost, you may be eligible to receive a bonus or commission in accordance with any scheme implemented by Willis from time to time of which is subject to the terms and conditions stipulated by Willis and/or the Willis Group.

...

Accountability

You are required to report directly to and be accountable to the CEO of Willis Australasia, or to any other representative of Willis or the Willis Group as designated from time to time.

Hours of work

The core hours of work for all full time employees are 37.5 hours per week, 7.5 hours per day. The core business hours are 8.30am to 5.30pm Monday to Friday. You agree to work during these hours and any reasonable additional hours as may be necessary to complete your work. Your remuneration takes into account all additional hours that may be required, therefore no overtime or penalties are payable.

...

Public Holidays

You will be entitled to gazetted public holidays as per the relevant State legislation without loss of pay.

Personal/Carer's Leave

...

Compassionate Leave

You are entitled to 2 days paid compassionate leave:
(a) to spend time with a member of your immediate family or household who has an illness or injury that poses a serious threat to their life; or
(b) in the event of the death of a member of your immediate family or household.

Parental Leave

After 12 months' continuous service you will be entitled to up to 52 weeks unpaid maternity, paternity or adoption leave. The 52 week period includes a paid period of 6 weeks maternity leave.

Long Service Leave

Long service leave will be treated in accordance with the relevant State legislation. For further details contact the Human Resources department.

Statutory Minimum Conditions of Employment

Where minimum statutory conditions of employment apply to your leave entitlements these minimum conditions of employment will prevail to the extent of any inconsistency with the terms of this letter of appointment.

...

Policies and Procedures

The Willis Group has policies and procedures including its Code of Work that are formulated for the efficient and fair administration of employment matters. A condition of your employment is compliance with any policies and procedures which the Willis Group has or may in the future adopt. Failure to comply with these policies and procedures may result in disciplinary action being taken against you.

Termination of employment

Your employment may be terminated by either party giving the other 6 months notice of termination. Willis may, at its discretion, pay you in lieu of working out all or part of the notice period.

However, if at any time during the term of your employment:

(a) you are guilty of serious misconduct;

(b) you neglect to give your whole time and personal attention to the performance of your duties or absent yourself from the duties without leave except in the case of illness or accident; or

(c) you disobey or neglect any of our lawful orders or directions;

then we may take disciplinary action or counsel you or, in serious circumstances, we may summarily dismiss you.

Further, Willis is not required to provide work to you during the notice period and may require you to do no work or only work of a particular kind. Willis may also direct you to not attend its place of business during the notice period.

...

Monies owed to the Willis Group

You agree that any monies owing to Willis or the Willis Group including any overpayment of salary, annual leave loading or bonus or credit card expenses will to the extent permitted by

law, be deducted from your final payment on or about the date of termination. If such deduction is not permitted by law or the amount owing is in excess of the final payment on termination this amount will become a debt owing to Willis and must be repaid to Willis within 7 days of the date of termination.

Completeness

This letter of promotion replaces all previous written or oral agreements and understandings between the employee and the employer. Further, any variation of this letter of appointment will be of no force and effect unless reduced to writing and signed by you and Willis.

...

To signify your acceptance of the promotion and employment conditions please sign the original of this letter and return it to Human Resources...

Scott Pickering
Chairman and Acting Chief Executive Officer - Australasia
WILLIS

...

19 SEPTEMBER 2011
...

[signature]
Donald Mitchell-Innes".

12 The Code of Work was expressly referred to in the contract letter as being part of the policies and procedures compliance with which was a condition of Mr Mitchell-Innes' employment. The Code of Work contained the following relevant provisions:

"Code of Work

...

2. Coverage
The Willis Code of Work applies to all employees of Willis Australia.

...

6. Our Expected Behaviour

All employees know and consistently adopt the expected behaviours outlined in the Code of Work for the benefit of each individual and Willis.

All employees follow the professional and ethical behaviour identified and clarified in the Code of Work in their relationships with clients and colleagues.

...

12. Misconduct

Misconduct which may lead to disciplinary actions may include, but is not limited to:

...

- *refusal to comply with any lawful order excessive ordering and/or distribution of alcohol intoxicated behaviour.*

...

26.2 Alcohol and Drugs

...

Any employee demonstrating signs of being under the influence of either alcohol or drugs in the workplace will be required to leave the premises immediately. Any issues occurring in the workplace that are alcohol or drug related will be viewed seriously and will be dealt with under the Willis disciplinary procedure and may result in termination of employment.

If an employee acknowledges the existence of a problem and seeks professional help to resolve the problem, the Company will support the employee.

...

27. Corrective Action

An important part of this code is to ensure all employees continue to operate according to the Code of Work. We need to have systems that ensure early identification of any employee who does not meet the expected level of behaviour.

The Human Resource Policies includes a procedure for Disciplinary Counselling that deals with failure to meet expected behaviour described in the Code of Work.

The procedure works on the principle of providing the opportunity for the employee to improve their required behaviour.

Willis will provide support where appropriate, however the employee is responsible for ensuring the necessary change occurs.

In most situations where any employees behaviour is in conflict with the code, the standard process, involving a number of increasingly more formal steps, is followed.

Each situation is reviewed at on its merits and all relevant circumstances are considered.

The corrective action is an important part of this code as it assists with our aim to provide a positive, supportive and healthy work environment for all employees."

13 Another relevant policy was the Willis Disciplinary Counselling Policy. It relevantly provided:

"Disciplinary Counselling Policy

...

2. Coverage
The Willis Disciplinary Counselling Policy applies to all employees of Willis.

...

4. Policy
All employees are expected to comply with various obligations, examples of which are set out below. The Willis Disciplinary Counselling Policy is intended to deal with breaches of these obligations and other misconduct. Examples of misconduct and how they would be dealt with are given below although this list is not meant to be exhaustive. Gross misconduct and its consequences are dealt with separately at the end of this section.

4.1 Contract of Employment
The Contract of Employment defines an employees contractual obligations to Willis...

4.2 Performance of Duties

Employees are required to perform their work in a diligent and responsible fashion and to a high standard. Failure to reach the required standard may result in the Company taking action under the Performance Improvement Counselling Policy.

4.3 Legal Obligations

In addition to the contractual obligations, employees have certain common law duties of general good conduct, honesty, propriety and statutory duties in connection with legislation such as Occupational Health and Safety, Sex Discrimination, Racial Discrimination and Disability Discrimination.

...

4.5 Examples of Disciplinary Counselling

Below are some examples of disciplinary counselling but the list is not exhaustive. Disciplinary action will naturally depend on the degree of severity or frequency of the misconduct:

- *Poor timekeeping, hours of work are set out in the Contract of Employment and must be adhered to.;*
- *Failure to comply with the leave procedures or unauthorised absence(s);*
- *Failure to comply with safety regulations or Company requirements; it is the responsibility of Willis and its staff to create a safe working environment Breaches of these rules and regulations are therefore irresponsible and endanger the well being of colleagues;*
- *Negligence of duties, poor performance resulting from irresponsibility or disobedience indicates an unwillingness to abide by the contractual obligations. This includes refusal to carry out or act in accordance with reasonable instructions;*
- *Irresponsible behaviour, intoxication, frivolous, violent or threatening behaviour cannot be tolerated in the workplace as it affects the welfare of colleagues and business efficiency and might bring Willis into disrepute;*

...

5. Procedure

- *The Manager is to investigate the offence committed,*
- *The Manager is to advise the employee of the alleged offence or breach of discipline and provide the associate with the opportunity to explain their actions,*

- *The Manager will decide which course of action is appropriate*

The procedure for dealing with general misconduct will depend on the severity and / or frequency of the misconduct, as well as the general circumstances surrounding it. The associate is to always be given prior notice of a formal meeting. The procedure is as follows:

Stage 1 Verbal Warning
Stage 2 First Written Warning
Stage 3 Final Written Warning
Stage 4 Dismissal

In most cases the procedure is followed step by step. However in serious cases of misconduct, negligence or incompetence the process may be condensed to a first and final meeting / warning This action is subject to approval from Human Resources and the Chief Executive Officer

5.1 Right to be Accompanied
The employee has the right to be accompanied at any formal meeting within this procedure This may be by a colleague, union representative or other nominated representative The representatives role is to be an observer / witness to the meeting.

6. Gross Misconduct
As the term implies, this is the most severe type of misconduct and will be dealt with by summary dismissal, ie dismissal without notice Listed below are examples of gross misconduct, but this list is not exhaustive:

- *Theft from Willis, its staff or clients;*
- *Assault on any of Willis' staff or clients.*
- *Dishonest or fraudulent conduct, whether in connection with the associates work or general duties within Willis;*
- *Any objectionable behaviour towards clients or colleagues or members of the public where Willis considers such behaviour will bring it into disrepute;*
- *Any behaviour which is in breach of the duty of utmost good faith, a duty which Willis regards as being of paramount importance within the insurance industry;*
- *Any breach of legislation or regulation which may adversely affect Willis;*
- *Vandalism or wilful damage to property belonging to Willis or any of its staff or clients;*

...

> • *Intoxication, use of illegal substances or other behaviour which endangers the well being of Willis' staff or clients, or which could seriously damage Willis' reputation;*
> ...
>
> ***7. Suspension from Work***
> *A thorough investigation of any misconduct or serious breach of discipline is necessary to ensure that the full facts are disclosed in order that appropriate disciplinary measures can be taken."*

14 There was some debate about whether the terms of the Code of Work and the Disciplinary Counselling Policy were contractual. That question is to be resolved by the understanding of the reasonable person viewing the language in the contract letter and the policies, see *Barker v Commonwealth Bank of Australia* [2012] FCA 942 at [304]-[313] and *Riverwood International Pty Ltd v McCormick* (2000) 177 ALR 193 at [102]-[108], [146]-[150].

15 In the "*Polices and Procedures*" section, the contract letter relevantly stated:

> *"A condition of your employment is compliance with any policies and procedures which the Willis Group has or may in the future adopt. Failure to comply with these policies and procedures may result in disciplinary action against you".*

16 Amongst its effects, this provision obliged Mr Mitchell-Innes to follow the policies and procedures.

17 This requirement applied not only in relation to Mr Mitchell-Innes' performance as an employee in adhering to obligations imposed on employees by the policies, but also in dealing, as a senior employee and representative of Willis, in his role as New South Wales General Manager, with infractions of the policies by other employees. This is reinforced by the terms of the Disciplinary Counselling Policy which provided at paragraph 4, that "[a]*ll employees are expected to comply with various obligations...set out below*" and the terms of the Code of Work that "[a]*n*

important part of this code is to ensure all employees continue to operate according to the Code of Work". Mr Mitchell-Innes was a "*Manager*" within section 5 of the Disciplinary Counselling Policy in dealing with subordinate employees who report to him. His employment obligations included following the relevant procedure in dealing with misconduct by his subordinates.

18 Thus, the procedures mandated by the policies contemplated actions by Willis (through its relevant manager) and the defaulting employee. The obligation on the employee to undertake certain actions is, to some extent, dependent on Willis also complying with the policy and the rights of the employee under the policy. Section "***5. Procedure***" in the Disciplinary Counselling Policy is an example of this.

19 In this context, to say that "*compliance with...policies*" is a condition of Mr Mitchell-Innes' employment, as the contract letter states in the "*Policies and Procedures*" provision, is not merely to impose an obligation on Mr Mitchell-Innes. The text justifies the construction that Mr Mitchell-Innes has the rights and benefits, as well as the obligations, resulting from the policies becoming a condition of his employment. Compliance with the policies, whether by the employer or by Mr Mitchell-Innes, is a condition of his employment contract. I do not accept that the proper construction of the employment contract involved a subdivision of mutual obligations in the policies and procedures documents, so that only obligations upon employees became contractual.

20 The reference in s 4.1 of the Disciplinary Counselling Policy that the contract of employment defined the employee's contractual obligations does not imply that the employment contract does not include obligations on Willis in the Disciplinary Counselling Policy as part of Willis' contractual obligations. Nor, in my view, were the references to disciplinary action, as distinct from common law remedies in contract like termination and damages, persuasive in determining whether the obligations in the

Disciplinary Counselling Policy and the remedies there provided became part of Mr Mitchell-Innes' contract of employment.

21 Of course, the terms of a particular policy may negate the existence of a mandatory obligation, such as by using language that is merely aspirational or descriptive. But the provisions of the contract letter and the matters in the preceding paragraphs persuade me that, in general terms, obligations under the policies were made contractual by the contract letter.

22 It might be doubted whether any terms of those policies inconsistent with the provisions of the contract letter would prevail over the terms of the letter. But the contract letter and the policies must be read together to identify the terms of the employment contract and the proper construction of those terms.

Intoxication in the employment agreement

23 Intoxication is not referred to directly in the contract letter but is referred to in the two policies. The contract letter identifies that summary dismissal may occur where there is "*serious misconduct...in serious circumstances*".

24 The Code of Work, whilst inelegantly phrased, seems to categorize "*intoxicated behaviour*", "*excessive ordering...of alcohol*" and "*excessive...distribution of alcohol*" as possible examples of misconduct that may lead to disciplinary action.

25 The Code of Work also indicates that an intoxicated person in the workplace is serious, that the person will be removed from the workplace, the disciplinary procedure will apply and "*may result in termination*", although Willis would support an employee who frankly discloses such a problem and seeks assistance.

26 In the Disciplinary Counselling Policy "*intoxication*" is listed as an example of "*disciplinary counselling*". Sections 4.5 and 5 seem to regard it as an

example of "*general misconduct*" or "*misconduct*". The appropriate procedure in dealing with it, as with any misconduct, depends upon its "*severity*", its "*frequency*" and "*the general circumstances surrounding it*". The procedure involves a number of warnings prior to dismissal, and even a "*serious case of misconduct*" involves at least one warning prior to dismissal.

27 Intoxication also appears in the examples of gross misconduct, justifying summary dismissal, as follows:

> *"Intoxication, use of illegal substances or other behaviour which endangers the well being of Willis' staff or clients, or which could seriously damage Willis' reputation"*

28 The reference to intoxication in both the general misconduct and gross misconduct sections of the Disciplinary Counselling Policy raises the question of whether intoxication is misconduct or gross misconduct.

29 The reference to "*other behaviour*" in the definition of "*Gross Misconduct*" suggests that to be gross misconduct the intoxication must endanger "*the well being of Willis' staff or clients*" or be conduct "*which could seriously damage Willis' reputation*". These conditions appear to attach to intoxication and use of illegal substances as well as "*other behaviour*". The inclusion of the word "*other*" tends to suggest this construction, because its absence would tend to suggest the contrary.

30 The Disciplinary Counselling Policy, when referring to intoxication as (mere) misconduct, appears to indicate that "*it affects the welfare of colleagues and business efficiency and might bring Willis into disrepute*". Thus, intoxication that "*might bring Willis into disrepute*" or intoxication that "*affects the welfare of colleagues*" is merely misconduct, but intoxication "*which could seriously damage Willis' reputation*" or "*which endangers the well-being of Willis staff*", is gross misconduct. This is a distinction, or construction, difficult to apply, and is thus an unlikely construction. "[W]*elfare of colleagues*" and the wellbeing of staff are matters not

measurably different. Nor is bringing Willis into disrepute measurably different from serious reputational damage. In these circumstances, it seems that the "*well being*" or welfare of staff and the matter of possible "*disrepute*" or damaged "*reputation*", whilst relevant to whether conduct is mere misconduct or gross misconduct, do not appear to be determinative of which characterisation is appropriate.

31 The question to be determined under the contract is whether the conduct was serious misconduct in serious circumstances. The parties appeared to accept that the meaning of these words was no different to "*gross misconduct*". Thus, the general law in respect of summary termination of employment has application to this contract of employment.

32 It has been said that one act of misconduct can justify dismissal only if it amounts to repudiation of the contract or its essential conditions, and may perhaps need to be even wilful or deliberate conduct: *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287, 289; *North v Television Corporation Ltd* (1976) 11 ALR 599 at 608-609 quoted in *Gooley v Westpac Banking Corporation* (1995) 129 ALR 628 at 636-637. See also *Pepper v Webb* [1969] 1 WLR 514 at 517G. Another formulation of the test of gross misconduct is whether the misconduct is sufficiently serious as to manifest an unwillingness to be bound by or honour the obligations of the contract, but cf *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 at [254].

33 In *Desmond Henry Randall v Aristocrat Leisure Limited* (ACN 002 818 368) [2004] NSWSC 411 at [449] Einstein J adopted authorities stating that a single act of misconduct cannot found termination unless it "*is of such aggravated character that it strikes the employment contract down immediately, completely and permanently*". His Honour also referred to the need to consider the whole of the relationship including the length of service, demonstrated ability and standards of prior conduct as well as the motives of the employee. See also *Rankin* at [250], *Peter Tao Zhu v*

Sydney Organising Committee for the Olympic Games & Ors [2001] NSWSC 989 at [223].

34 Intoxication ranges from being habitual and gross and interfering with the employer's business to an isolated act in circumstances of festivity unconnected with the employer's business, see *Clouston & Co Ltd v Corry* [1906] AC 122, 129. The circumstances and the surrounding facts determined whether at common law intoxication enlivened a power to summarily terminate employment. Willis relied on *Kearns v Glencore UK Limited* [2013] EWHC 3697 at [70]-[78] as authority for the proposition that a solitary instance of drunkenness is sufficient, but that case did not involve an isolated instance of drunkenness.

35 Thus, "*continual drinking*" where safety issues are apparent (*Drysdale v New Era Steamship Company Ltd* (1936) 55 Ll.L.Rep. 45 at 51) or repeated intoxication and real danger to the employer's business (*Wise v Wilson* (1845) 1 CAR & K 981, 984) have been held to justify summary determinations.

36 In addition to these factors, the textual matters referred to above suggest that the relevant considerations as to whether intoxication at work amounted to gross misconduct include whether the safety, "*welfare*" or "*well being*" of staff or clients was affected, or at risk; whether Willis' reputation was or could be seriously damaged or whether Willis could be or was "*brought into disrepute*"; what was the "*degree of severity*" of the intoxication; what was its "*frequency*"; and what were the "*general circumstances surrounding it*". It may also be relevant that "*in serious cases of misconduct*" the four-stage warning system may be "*condensed to a first and final meeting/warning*"; that acknowledgement of "*the existence of a problem*" and seeking professional help are matters of amelioration because when they are manifest Willis "*will support the employee*"; that the "*standard process*" involves "*a number of increasingly more formal steps*"; and that "[the disciplinary] *procedure works on the*

principle of providing the opportunity for the employee to improve their required behaviour".

37 The conduct of Mr Mitchell-Innes must be considered against these factors.

38 It is also important to remember, in my view, that a contract may vest in the employer a discretion as to whether to summarily terminate or not. That is the nature of a right: a power that enlivens a discretion. The question in this case is whether the right has arisen, not whether the Court would be minded to exercise the right in the same manner as the employer.

39 Willis also made reference to provisions in the *Fair Work Act 2009* (Cth) ("FWA") and Fair Work Regulations 2009 ("FWR") which provided that employees could be terminated without notice for "*serious misconduct*", which included being "*intoxicated at work*". Intoxication was defined to be where the employee was so impaired by intoxicating liquor as to be "*unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform*" (see FWA ss 123 and 12, and FWR 1.07). No claim is made that these statutory provisions are applicable, only that statutory norms "[influence] *and* [establish] *the common law...so as to ensure legal coherence between the common law and statute*".

40 That there may be a "*symbiotic relationship*" between a statute and the common law (see *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 at [31] per Gleeson CJ, see also M Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 36(3) UNSWLJ 1002, 1005-1006) does not mean that this statute which is conceded not to apply to Mr Mitchell-Innes (directly) should nevertheless be held to apply to him indirectly, by informing the proper construction of his employment contract.

D. Mr Mitchell-Innes' conduct at the Melbourne Conference

The previous evening

41 Mr Mitchell-Innes arrived in Melbourne on Sunday, 30 October 2012 at 2pm, in preparation for sales training the next day conducted by Willis for selected Australian staff. His role at the training was as an "*observer*", although he was invited to the "*coaches training*" that Sunday afternoon, which he attended.

42 After the coaches training session, Mr Mitchell-Innes attended a dinner for several employees at the Alluvial Restaurant, where he spent some time speaking with Richard Napier, the facilitator of the training. Mr Mitchell-Innes gave evidence that about 12 people were present. This was supported by Ms Usher who estimated 10 people, and Nigel Groome, who estimated at least a dozen. Bryan Leibbrandt suggested that 25 to 30 were invited. A receipt for the dinner indicated that 11 main courses were ordered. I conclude that about a dozen persons attended the dinner, all of them Willis employees or persons associated with the sales training conference.

43 The receipt also indicated that about $740 worth of alcohol was consumed in the period of a little less than three and a half hours. The drinks appeared to comprise of 8 bottles of wine plus 24 individual alcoholic drinks, which may equate to approximately 80 or more standard drinks.

44 At some time during the evening the dinner concluded: Mr Leibbrandt thought about 10.30pm, Ms Usher and Mr Groome 9.30pm to 10pm. The payment receipt for the dinner showed a time of 10.26pm, and pursuant to s 146 of the *Evidence Act 1995*, this record is presumed to be true in the absence of evidence that raises a question about the record of the time. Although the time estimates vary, I do not regard them as raising a question about the reliability of the time on the receipt. Accordingly, I

accept that the receipt is a true record of the time of payment by Mr Leibbrandt and the approximate time of his departure from the restaurant.

45 Most of the party walked to the Irish Times hotel, which was located more proximate to the RACV where the interstate visitors such as Mr Mitchell-Innes were accommodated. Mr Mitchell-Innes gave evidence that nine people attended the Irish Times: Mr Mitchell-Innes, Ms Usher, Mr Groome, Mr Leibbrandt, Lyndall Ridley, Grant Coppard, Luke Ware, Brian Hodgson and Russ Mehmet. At least two other witnesses corroborated the attendance of all but Mr Mehmet and Mr Hodgson, and none disputed the attendance of any particular one of the nine persons. Mr Ridley, Mr Coppard, Mr Ware, Mr Hodgson and Mr Mehmet did not give evidence. On the balance of probabilities, I accept Mr Mitchell-Innes' evidence that the nine named persons attended.

46 Mr Leibbrandt said he left the Irish Times with Mr Ridley at about 11.30pm, Mr Groome said he left at "*just after midnight*", or at "*approximately 12.38am*", according to a "*large clock above the door*". There was no clock above the door. Mr Groome gave evidence that before he left only he, Mr Mitchell-Innes and Ms Usher remained.

47 Ms Usher was unable to give evidence of what happened after 2am. Mr Mitchell-Innes thought he left not long after 3am, "*it might have been as late as 4*", although he could not deny he left at 6.45am. Mr Mitchell-Innes conceded that he was slightly intoxicated when he left the Irish Times.

48 Nitin Parashar, the director of the corporate owner of the Irish Times and the person managing the hotel that evening, said the business closed at 2am, and Mr Mitchell-Innes and Ms Usher left at that time.

49 About 90 drinks were consumed at the Irish Times. Mr Mitchell-Innes conceded drinking eight or nine drinks in addition to six to eight drinks from 4.45pm Sunday afternoon until the conclusion of the dinner at the Alluvial Restaurant. Thus, he conceded drinking 14 to 17 drinks in the 16 hours

before his attendance at the conference. He claimed to have restricted himself to drinking water towards the end of the evening. Mr Parashar gave evidence that from the bar Mr Mitchell-Innes regularly obtained, and drank, water.

50 It was unclear whether the party of Willis employees were the only persons who had consumed the drinks recorded on the tax invoices issued by the Irish Times. Mr Mitchell-Innes gave evidence that a group of five or six gentlemen from Western Australia spent time drinking with him, Ms Usher and particularly with Mr Groome. Mr Parashar supported this evidence although Mr Groome denied it.

51 The receipts also indicate payments were made to the Irish Times at 4.16am and 6.45am. The time on the receipts, pursuant to ss 146 and 147 of the *Evidence Act 1995*, raise a presumption that the final bill was paid at about 6.45am, unless there is evidence to raise a doubt about the time on the receipts.

52 The defendants also tendered a document produced by National Australia Bank indicating a time the same as that recorded on the EFTPOS receipt. However, no evidence was given from a National Australia Bank employee as to how the document was created, and I was uncertain as to whether it added anything to the EFTPOS receipt.

53 Sections 146 and 147 of the *Evidence Act 1995* provide:

> ***"146 Evidence produced by processes, machines and other devices***
>
> *(1) This section applies to a document or thing:*
> *(a) that is produced wholly or partly by a device or process, and*
> *(b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.*
> *(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly*

used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Note. *Example:*

It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

147 Documents produced by processes, machines and other devices in the course of business

(1) This section applies to a document:

(a) that is produced wholly or partly by a device or process, and

(b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.

(2) If:

(a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence), and

(b) the device or process is or was at that time used for the purposes of the business,

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.

(3) Subsection (2) does not apply to the contents of a document that was produced:

(a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or

(b) in connection with an investigation relating or leading to a criminal proceeding.

Note. *Section 182 of the Commonwealth Act gives section 147 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents."*

54 These provisions require me to consider whether there was evidence sufficient to raise a doubt about the reliability of the machine producing the receipts and (perhaps) the National Australia Bank document.

55 I have referred above to the evidence of Ms Usher and Mr Mitchell-Innes about their departure time. I do not regard that evidence as sufficient to raise a doubt about the presumption.

56 On the other hand, Mr Parashar was not intoxicated and gave evidence of an earlier departure. His evidence about the arrival time was inaccurate and this militates against the reliability of his evidence of time generally. However, and more significantly, Mr Parashar gave direct evidence about the unreliability of the EFTPOS machine. He testified that he had problems with the EFTPOS machine, which was later changed and that the times recorded on the receipts were incorrect.

57 Mr Parashar did not seek to avail himself of a certificate under s 128 of the *Evidence Act 1995*, to protect against any liability for breaching licensing laws, when he was cross-examined about keeping the bar open very late. It was not put to Mr Parashar that he had lied about the time the bar closed, and I was not persuaded that his evidence was given dishonestly.

58 In my view, the evidence of Mr Parashar, with perhaps some limited support from the evidence of Mr Mitchell-Innes, raises a doubt about the presumption. A doubt must, I think, be a reasonable doubt, but need not displace the presumption on the balance of probabilities in order to "*raise a doubt about the presumption*".

59 If a statutory doubt is raised, the presumption does not operate. In other words, no presumption arises and ss 146 and 147 of the *Evidence Act 1995* do not enable the receipt to provide any evidence of time.

60 Section 69 of the *Evidence Act 1995* provides:

*"69 **Exception: business records***

(1) This section applies to a document that:

(a) either:

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or

(ii) at any time was or formed part of such a record, and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

(2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation:

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

(4) If:

(a) the occurrence of an event of a particular kind is in question, and

(b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind,

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Notes.

1 Sections 48, 49, 50, 146, 147 and 150 (1) are relevant to the mode of proof, and authentication, of business records.
2 Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records."

61 The receipt may be a business record and may contain a previous representation, that is, the representation about timing recorded in it. But the representation is not made or supplied by any person who might reasonably be supposed to have knowledge of the timing. Mr Mitchell-Innes, Ms Usher and Mr Parashar, apparently the persons involved in the creation of the receipts, do not make the representation, and at least Mr Parashar denied the receipts' accuracy as to time. By so doing he gave evidence against having personal knowledge of the timing there recorded.

62 There is one other piece of evidence said by Willis to support a 6.45am departure. Paul French, the Willis General Manager for Queensland, gave evidence that he arose and visited the gym at the RACV Hotel at about 6am, and returned about 6.50am. On both occasions he "*did not notice anything unusual in the corridor*". But at 7.10am he heard a loud noise coming from the hallway and noticed Mr Mitchell-Innes asleep on a "*bench*". Willis submitted that Mr Mitchell-Innes must therefore have returned to the hotel between 6.50am and 7.10am.

63 George Stratas, the manager on duty at the RACV, gave evidence that there were two wings on each floor with a house phone in a little lounge area. That is where he found Mr Mitchell-Innes asleep shortly after 7am. This area was "*around the corner from the lift lobby*". Although Mr Stratas' evidence indicates that Mr Mitchell-Innes was in reception, or perhaps had returned to his room, by 7.10am, rather than still asleep in the lounge, this is immaterial to the timing of Mr Mitchell-Innes' return from the Irish Times.

64 I was not persuaded that the evidence of Mr French was probative in determining when Mr Mitchell-Innes returned to the hotel. There was in

evidence no diagram of the layout of the bench compared to the movements of Mr French. And Mr French first noticed Mr Mitchell-Innes because of the snoring he heard rather than because of an observation. Had Mr Mitchell-Innes merely been quietly asleep and was passed unnoticed by Mr French at 6am and 6.50am?

65 Mr French did not notice "*anything unusual in the corridor*", but he did not give evidence that he had earlier looked, or would necessarily have looked, at the area where Mr Mitchell-Innes was sleeping. As Mr Stratas says, which I accept, Mr Mitchell-Innes was asleep on a large bench in a little lounge area around the corner from the lift lobby. The geographic relationship between this area and the "*corridor*", the "*bench*" and the "*hallway*", of which Mr French spoke, was not explained.

66 Thus, the Court was left with the documentary evidence of the receipts, which are of no utility if a doubt precludes the presumption arising; Mr Mitchell-Innes' uncertain evidence about the time when he left, noting that he admitted to having been "*slightly intoxicated*" at that time; and Mr Parashar, whose evidence might also be mistaken as to the time, but which I accept to be honestly given.

67 In the circumstances, I am unable to determine precisely when Mr Mitchell-Innes left the Irish Times. It was late, and it was between the hours of 2am and 6.45am.

68 Mr Mitchell-Innes leaving the bar at 2am, 3am, 4am or 6.45am could only be important if he was consuming significant quantities of alcohol in the hours immediately before he left. But the receipts do not indicate when the drinks were consumed; at best they indicate when payment was made. Also, if Mr Mitchell-Innes was drinking water as the evening progressed, the time at which he left could not be significant as to his level of intoxication later in the day.

69 I am not persuaded that the time at which Mr Mitchell-Innes departed the Irish Times is significant in determining whether he was intoxicated at the conference.

Intoxication at the conference

70 The three state General Managers of Willis from Western Australia, Queensland and Victoria, respectively Mr Leibbrandt, Mr French and Brent Lehmann, each gave evidence that in their view Mr Mitchell-Innes was intoxicated at the conference when he appeared around 9am.

71 Mr Leibbrandt referred to Mr Mitchell-Innes being about one hour late for the training session, smelling strongly of alcohol, relaxed, playful, smiling, laughing, enjoying himself, talking loudly, slurring his words, making animal noises, and throwing lollies. Some of these observations are less than compelling evidence of intoxication, and too much significance could be attributed to the playful mood, the animal noises and the lolly throwing, to which I shall return. But the loud and slurred talking, coupled with smelling strongly of alcohol are less easy to explain, absent intoxication. Mr Leibbrandt's evidence was challenged on the basis of the report of Mr Cripps in which Mr Leibbrandt described Mr Mitchell-Innes as pale, unable to walk straight and smelling of alcohol. This difference in observations weakens Mr Leibbrandt's observations and opinion of intoxication but does not cause me to reject his evidence.

72 Mr French also gave evidence that Mr Mitchell-Innes smelt of alcohol, and spoke loudly. He gave other observations that I found less persuasive, such as red and strained eyes, which could be attributable to a lack of sleep. Mr French said Mr Mitchell-Innes was bright and chirpy, but at one stage disturbed others and at other times sat at the back of the room with his iPad. Mr French stated that on occasions he had seen Mr Mitchell-Innes retain the capacity to perform well the next day after a night of drinking, but that this was different.

73 Mr Lehmann had told Mr Cripps that he only observed Mr Mitchell-Innes briefly. He smelt of alcohol and was unsteady on his feet. Mr Lehmann also thought Mr Mitchell-Innes was under the influence of alcohol. Mr Lehmann was telephoned by Mr Wilkinson at lunchtime and was requested to find out about whether Mr Mitchell-Innes had been under the influence of alcohol and whether any abusive or disruptive behaviour had taken place.

74 Mr Groome, the National Development Manager of Willis, was not interviewed by Mr Cripps. However, he gave evidence in an affidavit some 14 months later that, at the time, Mr Mitchell-Innes smelt of alcohol on his breath and slurred his words.

75 No other witnesses gave evidence of Mr Mitchell-Innes' behaviour or condition. There was no evidence from the facilitator that Mr Mitchell-Innes was disruptive.

76 Mr Parashar gave evidence that, at the Irish Times, Mr Mitchell-Innes was not intoxicated. However, Mr Mitchell-Innes conceded that by the time he left the Irish Times he was intoxicated.

77 Mr Stratas was the morning manager that day at the RACV. He also viewed Mr Mitchell-Innes at about 7am that morning. He found it difficult to wake Mr Mitchell-Innes, but when he did he thought Mr Mitchell-Innes was unstable on his feet and had difficulty communicating. In my view, this evidence was of limited assistance. Unsteadiness may be attributable to him being just awoken from inadequate sleep and the difficulty in communicating (apart from just being awoken) was partly attributable to Mr Stratas not understanding that the name "*Mitchell-Innes*" provided by Mr Mitchell-Innes was only a reference to Mr Mitchell-Innes' surname. Mr Mitchell-Innes conceded that he was "*marginally*" "*affected by alcohol*" at 7am.

78 The significance of Mr Mitchell-Innes being intoxicated at the Irish Times or the RACV will be dealt with later in this judgment. It was conceded by Willis to be of less significance than being intoxicated at work. Nor does Mr Mitchell-Innes' level of intoxication at 7am fairly convey his level of intoxication at 9am.

79 Mr Mitchell-Innes denied he was intoxicated at the conference. He attributed his slurred speech to a cut on his tongue arising from sleep apnoea. There was some independent evidence to support this, not only of the sleep apnoea but also of the cut on his tongue. Whether a cut on the tongue would likely result in the various descriptions of slurred speech was not established and might be doubted.

80 Mr Mitchell-Innes also sought to explain his unsteadiness. He attributed it to a broken heel on his shoe. This claim was not supported by other evidence.

81 Although there were valid challenges to some of the evidence of the Willis witnesses, there was also some consistency: smelling of alcohol (conceded by Mr Mitchell-Innes), speaking loudly and inappropriately and slurred speech. I accept that the reliability of these recollections is lessened by the passage of time, and I should be cautious about them, especially when they are materially different from the accounts in Mr Cripps' report.

82 The lolly throwing was apparently one lolly, not the subject of complaint by the target, Mr Ware, and similar to other occasions when lollies had been used by Willis to engender involvement. The animal noises may have been a playful response at the back of the room to a question by another State General Manager about one aspect of a recent trip by Mr Mitchell-Innes to Africa that was a topic of conversation.

83 Taking all these matters into account, I am persuaded on the balance of probabilities that Mr Mitchell-Innes was, at least to some extent, intoxicated at about 9am when he arrived at the conference session.

84 However, I am not persuaded that the level of intoxication of Mr Mitchell-Innes at 9am, or the impact of intoxication on his behaviour, was significant, or that his behaviour was disruptive. His participation in the session may have been embarrassing for some for the short period he was involved, particularly because of his position as a State Manager.

E. Analysis of the misconduct

85 As I have found that Mr Mitchell-Innes was intoxicated during the conference session, which was his workplace at the time, I find that misconduct is proved. Intoxication in the workplace is sufficient to establish misconduct by reason of clause 26.2 of the Code of Work and clause 4.5 of the Disciplinary Counselling Policy.

86 Whether misconduct is sufficiently gross to manifest an intention not to be bound by the contract of employment, or is fairly to be categorized as serious misconduct in serious circumstances, depends on the level of intoxication, the behaviour resulting from it, the circumstances surrounding the intoxication, whether it is a manifestation of a longstanding issue or a solitary example of misconduct, and other relevant matters mentioned earlier.

87 The misconduct occurred in the workplace. This increases the seriousness of the conduct. However, intoxication constitutes misconduct only when it is intoxication at work or at a work-related function. Willis conceded that intoxication not work-related is not sufficient to constitute misconduct.

88 By the time Mr Mitchell-Innes and Ms Usher left the Irish Times, Mr Mitchell-Innes was intoxicated. In this regard, I accept Mr Mitchell-Innes' concession, notwithstanding the contrary evidence of Mr Parashar. Willis submitted that drinks at the Irish Times were a work-related function. Willis met the cost of the alcohol consumed at the Irish Times (although some of this cost was apparently recovered from Ms Usher). However, I doubt whether Mr Mitchell-Innes and Ms Usher, remaining behind at the Irish Times until the early hours of the morning, and becoming intoxicated, can properly be regarded as becoming intoxicated at a work-related function. Whether that should have impacted upon reimbursement of the alcohol expenditure is a matter I do not need to decide. The drinking with Ms Usher was related to a work-related function in that it followed one earlier in the night. I do not think this suffices to constitute misconduct. Nor do I think the circumstances of privately getting intoxicated with a colleague after hours can fairly be described as serious misconduct.

89 The conference was not merely work-related, but work. Mr Mitchell-Innes attended the conference, his place of work on that day, initially in a state of low-level intoxication. He was the New South Wales State Manager, a position of some significance. The example he set was important to other junior staff. The seniority of his position is a matter that militates in favour of the misconduct being serious.

90 Willis also relied upon a warning given by Mr Wilkinson to the senior management team in the fortnight prior to the Melbourne conference. Mr Wilkinson said:

> *"I expect the senior management team to be disciplined and I work on a 3 strike policy. For the first offence I give a warning. For the second offence I give a second and final warning. For the third offence you are out".*

This comment was confirmed by Mr Leibbrandt and Mr Lehmann.

91 But this statement does not assist Willis because it reiterates the procedure of multiple warnings and also because, in any event, there is no evidence that it is directed to intoxication.

92 Mr Mitchell-Innes' role was as an observer, a level of participation much less than a presenter or a "*coach*". But he did involve himself in the program for a short time.

93 There was no evidence from junior staff in relation to their observations of Mr Mitchell-Innes, or its effects on them. Indeed, no one gave evidence of the effect on other staff. In that event, I am unable to conclude that there was any adverse effect on other staff, staff morale or staff behaviour or discipline as a result of Mr Mitchell-Innes' low-level intoxication at the conference.

94 There was no evidence of any aggression, violence, offensiveness, swearing, physicality, or unsafe behaviour engaged in by Mr Mitchell-Innes. The observation of his intoxication made at the rear of the room by the other State Managers - also apparently "*observers*" at the conference - was that Mr Mitchell-Innes smelt of alcohol, and for a short period when he involved himself in the table discussion, he spoke loudly, and lacked seriousness. This seems minimal in terms of the effect on others, especially in view of the lack of evidence from other junior staff or the presenters. There was, in my mind, little in the mode of behaviour of Mr Mitchell-Innes that added seriousness to his intoxication. He is said to have thrown a lolly. As I said, there was evidence that this was not an unknown method of engagement by Willis of participants in exercises. Although this may not have been the purpose behind Mr Mitchell-Innes' conduct, the event passed without comment by the recipient, or target, of the lolly. The reference to animal noises seems to be something said by Mr Mitchell-Innes to Mr Leibbrandt at the rear of the room as a means of conveying information about a recent safari undertaken by Mr Mitchell-Innes. I do not think it adds to the seriousness of the conduct, especially

because it only involved one person of equally senior level to Mr Mitchell-Innes.

95 The only evidence with respect to reputational damage was given by Mr Stratas, the RACV Manager, who testified that no damage to Willis' reputation had occurred.

96 The approach of Willis to alcohol consumption is relevant to the seriousness that should be attributed to intoxication. As is mentioned above, Willis submitted that attendance at the Irish Times (undoubtedly for the consumption of alcohol) was a work-related function. The cost of the alcohol so consumed was routinely, and was on this occasion, met or reimbursed by Willis, irrespective of the quantity of alcohol consumed or the ultimate level of intoxication of the participants. Standing alone, these matters do not enhance the seriousness of the intoxication, or suggest that it involved a significant departure from common company standards.

97 I referred earlier to the unchallenged evidence that Mr Wilkinson as the Willis Chief Executive Officer advocated a policy that its brokers "*follow the client*" in respect of alcohol consumption. I infer that this approach involved not only that the broker was expected to consume alcohol if the client did, but also that the quantity of alcohol consumption was, at least to some extent, dictated by the client's behaviour.

98 This instance involving Mr Mitchell-Innes did not involve entertaining a client, so there is limited application of the policy in present circumstances. But, in my view, the "*follow the client*" approach, the practice of Willis routinely meeting the cost of alcohol consumed at employee gatherings irrespective of its quantity, and the circumstance that a group of Willis staff from interstate drinking until the early hours of the morning constituted a "*work-related function*" are matters that inform whether excessive consumption of alcohol on one occasion, or the arrival at work later that morning hungover or in a state of low level intoxication is sufficient to constitute gross misconduct warranting termination.

99 On the morning when Mr Mitchell-Innes attended the seminar, Ms Usher did not. She, unlike him, did not attend work intoxicated. She presumably was unable to attend work because of her condition. She was not summarily dismissed. Mr Mitchell-Innes attended, was seen to be intoxicated, caused minimal disturbance, and was ultimately required to leave, perhaps at a time when he was no longer intoxicated. Given the minimal involvement of Mr Mitchell-Innes in the seminar, and the other work he was able to do on budgets with Ms Culvenor, compared to the absence of Ms Usher, it is difficult to identify in what respect the conduct of one was gross misconduct and the other not so. On the other hand, perhaps the conduct of Ms Usher was regarded by Willis as gross misconduct, but any power to summarily terminate her employment was not exercised.

100 Mr Mitchell-Innes had not previously been disciplined for attending work intoxicated. Nor was there evidence that this behaviour had ever occurred before. His conversation with Mr Lindhout about long lunches involving the consumption of alcohol was not any form of warning, and did not concern being intoxicated at work.

101 On the contrary, as mentioned previously, the evidence from Mr French was that several times Mr Mitchell-Innes had consumed a lot of alcohol the previous evening or early morning after "*kicking on*", but was able to turn up the next morning with a "*great ability to…contribute*", presumably unaffected by alcohol.

102 Thus, the circumstance of this intoxication at work was properly to be regarded as a solitary, one-off event in a period of almost nine years employment with Willis, from February 2004 until October 2012, and which did not involve any client relations as no client was present. These are matters that militate against a conclusion of serious misconduct in serious circumstances.

103 The provision of the Code of Work, that in respect of "*alcohol and drugs*" if "*an employee acknowledges the existence of a problem and seeks professional help to resolve the problem, the Company will support the employee*" is not consistent with summary termination, at least when it is the first occasion and the preconditions for the Company's support outlined in the Code are established: Mr Mitchell-Innes before and during the interview where he was summarily terminated acknowledged the problem, gave some reasons of explanation, and disclosed he was obtaining professional help.

104 A proper reading of the contract of employment, including the Willis policies, read in the context of Willis practices in relation to alcohol, indicates that intoxication at work, of itself, is not sufficient to warrant summary dismissal for gross misconduct. Something more is required, some aggravating conduct such as repetition of the intoxication, a severe level of intoxication, adverse impact on employee or client safety, violence, offensive conduct or offensive language, a serious impact on reputation or significant financial loss. But none of these features or other aggravating features existed in this case. Here there was a manifestation of low-level intoxication, without other consequences or behaviour of significance. Mr Mitchell-Innes spent most of the time at the back of the room, by himself working on his iPad. In my view, this behaviour, Mr Mitchell-Innes' condition at the conference, does not constitute a repudiation of the agreement, or other sufficiently serious misconduct enlivening a power of summary termination. It was not serious misconduct in serious circumstances.

105 Willis relied on other breaches of the agreement that it submitted were sufficiently serious to justify summary termination. Willis, however, conceded that the other asserted breaches ranked lower in level of seriousness than the charge of intoxication at work.

106 It was said that Mr Mitchell-Innes was guilty of "*excessive ordering*" of alcohol. This phrase is derived from clause 12 of the Code of Work.

107 There are three difficulties with this argument. First, it is unclear whether "*excessive ordering…of alcohol*" is sufficient of itself to constitute misconduct or whether the clause requires the ordering of alcohol to be coupled with a "*refusal to comply with any lawful order*", or with "*intoxicated behaviour*" or both.

108 Secondly, and perhaps more significantly, there is no suggestion that "*excessive ordering*" under clause 12, if misconduct, amounts to gross misconduct. Ordering alcohol in excess is not identified in the contract letter or the policies as a type of misconduct that may warrant summary dismissal.

109 Thirdly, I am not satisfied that Mr Mitchell-Innes ordered an excessive amount of alcohol. The evidence did not establish who ordered any particular drink. The same can be said of "*excessive…distribution of alcohol*". If "*order*" is constituted by allowing one's corporate credit card to be used to pay for drinks purchased, which I do not accept, then Ms Usher ordered most of the drinks. And Mr Leibbrandt ordered a greater amount of drinks at the dinner. There was evidence of $3,500 worth of food and alcohol being consumed by Willis staff at the conference the next night, apparently without any issue of excessive ordering arising. The circumstance that Willis met the expenses of alcohol on Mr Mitchell-Innes' credit card weakens any argument that the ordering of alcohol was excessive.

110 Another breach alleged by Willis is that Mr Mitchell-Innes was intoxicated in a public place, namely in the hotel lounge area and (perhaps) at the Irish Times. But Mr Mitchell-Innes did not manifest in the hotel lounge area any intoxicated behaviour: he was asleep on the bench. Even if it may be correct to describe a sleeping person as intoxicated, his behaviour could not amount to serious misconduct, as no additional behaviour reflecting intoxication occurred. The behaviour was not visibly different to being

merely asleep outside his room, in this case because of a lost key. This was not suggested to be gross misconduct, or even misconduct.

111 Intoxication in a public place is not listed in the policies and procedures as a form of misconduct. In any event, the internal corridors of a hotel where one is staying is not properly to be described as a public place. It is privately owned by the hotel, although guests, perhaps only certain guests, have a licence to use it. A hotel room might be similarly described.

112 Mr Mitchell-Innes conceded that he was intoxicated by the time he left the Irish Times. At that time he was in the company of Ms Usher only, and as she has no memory of what happened after 2pm, I could not find that she recognised that he was intoxicated. Mr Parashar did not. There was, at this stage, no work related function. Nobody gave evidence of observing that Mr Mitchell-Innes was intoxicated at the Irish Times. I do not think the intoxication at the conclusion of his visit to the Irish Times could constitute serious misconduct, or add to the seriousness (or otherwise) of what occurred at the conference.

113 Finally, Willis alleged that Mr Mitchell-Innes behaved unprofessionally in throwing the lolly. I have already considered this issue in the context of intoxication. By itself I doubt that it is properly to be described as misconduct, at least without further evidence about its impact on the recipient or object. It cannot constitute gross misconduct warranting summary dismissal.

114 Nor am I persuaded that all the conduct, taken together constitutes serious misconduct in serious circumstances. In my view, none of the other breaches alleged by Willis add to the seriousness of the misconduct of Mr Mitchell-Innes being intoxicated at work.

115 For these reasons, I am not satisfied that Mr Mitchell-Innes engaged in gross misconduct, or in "*serious misconduct in serious circumstances*" enlivening in Willis a power summarily to dismiss Mr Mitchell-Innes. It

follows that the conduct of Willis in dismissing Mr Mitchell-Innes is in breach of his agreement, and he is entitled to damages.

116 Mr Mitchell-Innes maintained other claims for breach of contract. Subsequent to the hearing, a claim for breach of an implied term of mutual trust and confidence was abandoned by Mr Mitchell-Innes as a result of the recent decision of the High Court of Australia in *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

117 Mr Mitchell-Innes submitted that the investigation in October and November 2012, in respect of his conduct was not thorough or in accordance with the contract. I do not need to resolve this issue since I have found that on a proper examination of his conduct, it did not warrant summary termination.

118 Mr Mitchell-Innes also submitted that if the conduct justified summary termination, that any power to terminate needed to be exercised honestly, not arbitrarily or capriciously, but in conformity with the contract in accordance with see *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 at [5], [6]. Whether the plaintiff could establish that Mr Wilkinson was dishonest, capricious or arbitrary in dismissing Mr Mitchell-Innes in circumstances where he was nevertheless entitled to dismiss him, would necessarily depend upon those circumstances. They do not exist here for I have found that Willis did not have an entitlement to summarily dismiss Mr Mitchell-Innes. Accordingly, I need make no finding about this submission or other claims of breach made by Mr Mitchell-Innes.

F. Damages

119 The damages suffered by Mr Mitchell-Innes depends particularly on his future prospects at Willis. His loss is less if his continued employment prospects with Willis were poor. It is a matter of significance that the

contract entitled Willis to terminate Mr Mitchell-Innes on six months' notice or payment in lieu.

120 Both parties, for differing reasons, dismissed any suggestion that Mr Mitchell-Innes might have been terminated by payment of six months' salary in lieu of notice. Willis says that if its summary termination was unlawful, Mr Mitchell-Innes' employment would have been terminated by six months' notice. Mr Mitchell-Innes disputes this, submitting that he would have remained employed.

121 Willis relies on the "*least burdensome performance rule*" to argue that damages should be calculated as if Mr Mitchell-Innes was terminated on six months' notice.

122 The rule was endorsed by Cowdroy J in *Transport Workers' Union of Australia v K & S Freighters Pty Ltd* [2010] FCA 1225 at [188]-[191] although that case involved the "*critical*" matter that the plaintiff had been employed for less than six months (at [191]). The decision in *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 might be more analogous, as the plaintiff's employment there had lasted 12 years (see [175]). In that case, Le Miere J found that the summary dismissal was justified. However, in dealing with the quantum of damages provisionally in case his decision was reversed, Le Miere J found "*there is no reason why the defendant would have terminated his employment on notice*" (see [178]).

123 The least burdensome performance rule finds authoritative support in the judgment of Mason CJ and Dawson J in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 91. The judgment referred to "*the firmly established rule that, in an action for breach of contract, a defendant is not liable in damages for not doing that which he or she has not promised to do*" and rejected:

> *"the submission that damages for wrongful dismissal could include extra benefits which the contract did not oblige the employer to confer upon the plaintiff but which he might reasonably expect the employer to have conferred upon him otherwise than in performance of the contract."*

124 However, the plurality (at 91-92) went on the record that this rule, namely:

> *"the rule that the defendant is not liable in damages for not doing that which he or she has not promised to do* [1] *is necessarily subject to the rule in Hadley v. Baxendale...the plaintiff is entitled to recover such damages as arise naturally, that is, according to the usual course of things, from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach".*

125 A similar approach is can be seen in the decision of Brennan J at 98 and at 102 where his Honour stated:

> *"In evaluating a plaintiff's benefits under a contract, the court does not look solely at the express terms of the contract but evaluates the plaintiff's rights to benefits of any kind, whether those benefits are expressed by the terms of the contract or are ascertainable by reference to circumstances extrinsic to those terms."*

126 The application of the decision in *Amann* to contracts of employment has led to a division of opinion between the Full Court of the Federal Court and the New South Wales Court of Appeal, see *McDonald v Parnell Laboratories (Aust) Pty Ltd* [2007] FCA 1903 at [77]-[79]. On one side of the divide, the two decisions of the Court of Appeal appear to focus on what I might term the contractual entitlement rule, reflected in the passages from the plurality in *Amann* first quoted above, see *New South Wales Cancer Council v Sarfaty* (1992) 28 NSWLR 68, 80-87; *Murray Irrigation Ltd v Balsdon* (2006) 67 NSWLR 73 at [54]-[59], see also [1] and [2]. On the other side, the decisions of the Full Court accord primacy to the rule in *Hadley v Baxendale* (1854) 2 CLR 517, see *Tasmania Development & Resources v Martin* (2000) 97 IR 66 at [37], *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 at [84].

127 It might be thought that the reference in *Amann* (at 91) that the contractual entitlement rule is "*necessarily subject*" to the rule in *Hadley v Baxendale* and the express reference in *Amann* to "*damages for wrongful dismissal*" (also at 91) favour the approach of the Full Federal Court. So also does the statement in *Amann* (at 93):

> *"that the mere existence of a contractual right in a party to terminate does not operate automatically to restrict the damages that can be awarded. The court does not reach a conclusion by reference to an improbable factual hypothesis. The court must have regard to the facts and evaluate the possible exercise of the right in all the relevant circumstances of the case".*

But this Court is bound by *stare decisis* to follow decisions of the Court of Appeal in preference to those of the Full Court (notwithstanding *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]).

128 However, in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357, the Court of Appeal held by majority that damages for breach of an employment contract included the lost opportunity to receive discretionary bonuses. This decision did not refer to the division of opinion, or any of the four appellate cases cited above, but in my view, sits more comfortably with the decision of the Full Court. Because of this and also because the case before me does not concern the possibility of a "*renewal*" of a contract of employment (cf *Murray Irrigation Ltd* at [57], *McDonald* at [78]) but with the prospect of a "*termination*" of employment, I am of the view that I should follow the *Silverbrook* decision and the Full Court decisions in *Martin* and *Walker.* Thus, whilst the existence of damage must be proved on the balance of probabilities, the assessment of quantum requires the Court to consider the value of the chance of a loss or the prospect of a gain.

129 In the result, the proper course is first to consider the likely circumstance if Mr Mitchell-Innes was not wrongly terminated. The circumstance that his

employer decided to end his employment summarily is a relevant but not conclusive factor informing, "*how the contract would have turned out had it not been brought to an end*" by the wrongful termination (see *Amann* at 94). This involves an assessment of the prospects of termination on notice (cf *Amann* at 97).

130 No evidence was given by any person from Willis who had authority to terminate Mr Mitchell-Innes' employment. Nor did any document evidence that his employment would have been terminated on notice if it could not be terminated summarily, or that there was a prevailing view that he was to be terminated irrespective of gross misconduct.

131 Mr Wilkinson, the Willis Chief Executive Officer for Australia, was not called to give evidence. He is the person who would have determined if Mr Mitchell-Innes was to be given notice. This absence of evidence from Mr Wilkinson makes it more difficult to draw an inference of termination on six months' notice, as direct evidence could have been given on this subject by Willis, but was not.

132 But Mr Mitchell-Innes for the purposes of his claim sought to rely upon the animosity Mr Wilkinson was said to have towards him. He led evidence, uncontradicted, that Mr Wilkinson had voiced a desire to get rid of him. This may suggest that termination on notice was in prospect.

133 Mr Wilkinson had been Mr Mitchell-Innes' direct supervisor for about a month. No notice of termination had been given. Mr Wilkinson had shown, admittedly in the short period before the events in Melbourne, an unwillingness to terminate Mr Mitchell-Innes' employment other than for misconduct. Does the intoxication at work, the misconduct in Melbourne, increase the prospect that Mr Wilkinson would have terminated Mr Mitchell-Innes on notice if he could not do so summarily? I think it does, but the extent to which it does remains uncertain.

134 There are other considerations. Manifesting an unwillingness to "*support*" Mr Mitchell-Innes, by terminating his employment, may weaken the trust of other Willis employees in Willis' commitment (in the Code of Work) to "*support*" them. But this did not impact on Willis' decision to summarily terminate Mr Mitchell-Innes. Termination on notice may enliven the interest of Head Office in London, where Mr Mitchell-Innes appeared to have some support and had been favoured with bonus arrangements. It was submitted that Mr Mitchell-Innes may have been able to call upon that support in the six-month period of notice, however, there is little evidence of this.

135 If I am to judge the time of Mr Mitchell-Innes' likely departure by financial considerations, I am in no position to do so. There is some evidence that he was worth $3 million per annum to Willis, but if so, those matters played no role in Mr Wilkinson adopting a more measured disciplinary approach than the one he adopted. Similarly, Mr Mitchell-Innes was entitled to some bonuses accruing in the years following but I have no evidence on which to assess whether that financial issue would have weighed upon Mr Wilkinson.

136 Had Mr Wilkinson followed the Disciplinary Counselling Policy, I think it most unlikely that there would have been a recurrence of Mr Mitchell-Innes' misconduct. Mr Mitchell-Innes had no previous similar misbehaviour at Willis, or before at his previous employment so far as the evidence reveals. Mr Mitchell-Innes was entitled to have this procedure in the Disciplinary Counselling Policy adopted. That may have rendered it more difficult for Mr Mitchell-Innes to be terminated for cause, as he was likely to have adhered to his obligations. But that might not have been enough to outweigh Mr Wilkinson's apparent animosity, and Willis remained entitled to terminate Mr Mitchell-Innes' employment on six months' notice. How deep-seated, or capable of change, were the desires of Mr Wilkinson to terminate the employment of Mr Mitchell-Innes was also not explored in any detail, nor was the prospect that Mr Wilkinson may cease to be Mr Mitchell-Innes' superior.

137 Ultimately, the onus was on Mr Mitchell-Innes to establish his loss. Although I should not readily draw the inference that Mr Wilkinson would immediately terminate Mr Mitchell-Innes' employment by notice in November 2012 if he could not do so summarily, that does not mean that I should assume that Mr Mitchell-Innes would remain in employment indefinitely where his immediate supervisor wanted his employment terminated and had the power to do so on six months' notice.

138 Doing the best I can, and bearing all these matters in mind, I have assessed Mr Mitchell-Innes as having a 60% chance of remaining in employment for a further approximately eight and a half months without being given notice until 31 July 2013.

139 After 31 July 2013 I have assessed Mr Mitchell-Innes' prospects of not being given notice as declining below 50%, and declining with time. There is also the prospect that over time his present employment would become as valuable as his employment with Willis would have been. The base salary differential is small, and bonus arrangements and prospects for the future with his new employer, and with Willis, grow more uncertain the further one attempts to peer into the future.

140 In these circumstances, I propose to assess Mr Mitchell-Innes' damages as if he was given notice on 31 July 2013. His employment would thus cease on 31 January 2014. Accordingly, he, on this approach, would be awarded 100% of the anticipated benefits until 31 July 2013, 100% of the anticipated benefits that would accrue to a person on notice in the period 1 August 2013 to 31 January 2014 and none of the anticipated benefits thereafter.

141 While this exaggerates the loss until 31 July 2013, it understates the loss thereafter and in my view fairly calculates his prospects of lost benefits in the future. It also fairly represents what I assess to be the point where the likelihood of receiving notice of termination exceeds the likelihood of not

receiving notice, and also represents the midpoint in the assessment of the declining loss over time. There is some artificiality in the date, but assessment of future loss is not an exact science, and in my view the date represents the best assessment the Court can do on the evidence available.

142 No issue was taken about liability as between the defendants, and Willis indicated no opposition to orders being made against both defendants. I recognise that some of the bonuses would have been paid by Willis companies other than the first defendant, but this is not a claim for unpaid bonuses but a claim for damages for breach of contract. The fact that, if Mr Mitchell-Innes remained in employment with Willis, the bonuses would be paid by another Willis company, or for that matter, a third party, does not diminish the entitlement of Mr Mitchell-Innes to recover those amounts lost as damages from the defaulting contracting party (cf *Amann* at 102 per Brennan J), so long as the rule in *Hadley v Baxendale* is satisfied.

Lost salary

143 At the time of his termination, Mr Mitchell-Innes was employed on a base salary of $293,084 plus superannuation of $15,775.20, a total amount of remuneration of $308,859.20. He obtained new employment on 1 February 2013 on a total remuneration of $280,000. Thus, his damages include $308,859.20 per annum for the 83-day period from 10 November 2012 to 31 January 2013 inclusive. This calculation amounts to $70,233.74 ($308,859.20 x 83/365). Although Mr Mitchell-Innes' remuneration with his new employer increases slightly during 2012, it seems reasonable to assume that the same differential between his remuneration at Willis and that at his new employer would be maintained for the 12 months ending 31 January 2014. If so, his damages must also include the difference between $308,859.20 and $280,000 for the following year from 1 February 2013 to 31 January 2014 inclusive, namely $28,859.20. The total lost salary is thus $99,092.94 ($70,233.74 + $28,859.20).

Lost retention bonus

144 On 7 December 2009 Willis wrote to Mr Mitchell-Innes in the following terms:

> *"STRICTLY PRIVATE AND CONFIDENTIAL*
>
> *Donald Mitchell-Innes*
> *c/o Willis Australia Limited*
>
> ...
>
> *Dear Donald,*
>
> ***RETENTION BONUS SCHEME***
>
> *I am pleased to confirm that a retention bonus scheme has been agreed. The retention bonus scheme will be structured as follows:*
>
> ***Commencing:*** *1 January 2010*
> ***Duration:*** *4 Years*
> ***1st Instalment:*** *On 1 January 2013, 50% of your current base salary (meaning base salary as at the 1st of January 2010) will be paid as a bonus*
> ***2nd Instalment:*** *On 1 January 2014, 50% of your current base salary (meaning base salary as at the 1st of January 2010) will be paid as a bonus*
>
> *If you resign or your employment is terminated by Willis during the 4 year period, the bonus scheme will no longer apply. You must also be an employee at the time of payment and not serving a notice period.*
>
> *Thank you for all your efforts thus far in 2009. I look forward to continuing our mutually beneficial working relationship.*
>
> *Yours sincerely*
> [signature]
> *Bill Donovan*
> *Chief Executive Officer*
> *Willis Australasia*
>
> ***Please be aware that this review is strictly confidential between yourself and the Company and you are not to***

discuss this with other Associates. This is particularly relevant to the bonus award.

cc: Emily Duran, Human Resources Manager".

145 Mr Mitchell-Innes' current base salary at 7 December 2009 was $236,364. Thus, under the Retention Bonus Scheme he would receive $118,182 on each of 1 January 2013 and 1 January 2014, subject to the conditions in the letter. Although the four year period concluded on 31 December 2013, prior termination of employment or being on notice would end the bonus scheme. In my view, this means that if termination, or being given notice, occurred during 2013, Mr Mitchell-Innes would be entitled to retain his 1 January 2013 payment, but would not receive his 1 January 2014 payment. As I have assessed that Mr Mitchell-Innes would receive notice on 31 July 2013, he is entitled to the value of the 2013 instalment but not the 2014 instalment.

146 Willis submits that since Mr Mitchell-Innes' employment was terminated on 9 November 2012, he was not entitled to receive the bonus, for the reason that there is "*no basis to read the word 'lawful' before 'terminated' in the letter*". But this submission does not assist Willis. Mr Mitchell-Innes might no longer be contractually entitled to be paid the bonus, not being employed. But if the lost bonus satisfies the rule in *Hadley v Baxendale*, as I find in respect of the first instalment, then Mr Mitchell-Innes is entitled to its value as damages for the breach of wrongful termination by Willis.

147 Willis also submits that there was no evidence of whether retention payments were actually made to other employees. That is immaterial. The correspondence establishes that Mr Mitchell-Innes would have received the bonus instalments had he remained employed by Willis and not on notice. The onus on Mr Mitchell-Innes was discharged by establishing that overwhelming likelihood on the probabilities, by the correspondence on the subject. It may have been open to Willis to prove that it could, and did, justifiably refuse retention bonus payments, so as to

displace the irresistible inference from the correspondence, but it did not do so.

148 Thus, the value of Mr Mitchell-Innes' lost retention bonus of $118,182 is a component of his damages.

The Long Term Incentive Program payments

149 In August 2011 Willis Group Holdings PLC in Ireland and London wrote to Mr Mitchell-Innes in the following terms:

> *"August 2011*
>
> *Dear Donald*
>
> *In May, as we shared with our senior leaders our multi-year plan to transform our business through The Willis Cause, I also invited a small group of valued Associates around the company, including you, to participate in our multi-year Long-Term Incentive Program (LTIP) aligned with that transformation effort. The Willis Cause and our LTIP now form an integral part of our plans for the future, and you are a big part of both.*
>
> *The LTIP for 2011 represents one meaningful way in which your commitment to The Cause will allow you to share in our success going forward. In my May letter, I informed you that you were nominated for a 2011 LTIP with an award level of up to approximately $75,000, subject to approval by the Share Award Committee. I am writing today to update you on our plans to implement this program.*
>
> *The 2011 LTIP Award, which will be 50% performance-based deferred cash and 50% time-based deferred cash, was to be communicated to you in July. We received feedback, however, about the long vesting schedule for the grant. Therefore, at our recent Board of Directors Meeting in Dublin, we received approval from the Compensation Committee to redesign the 2011 program which will shorten the vesting schedule to three years. This should be welcome news.*
>
> *In the new design of the plan, 50% of the cash award will vest in December of 2013 and 50% will vest in December of 2014. We hope that this enhancement will reinforce our commitment to you and our recognition of the value we*

expect you to bring to the delivery of The Willis Cause to our clients around the world.

As described in May, the 2011 LTIP will be partially time-based and partially performance based. At the end of 2011, when our yearly EPS and operating margin results are tabulated, we will finalize the awards based on our performance against these targets. Once these numbers are measured, formal grant documentation for the LTIP will be issued in early 2012.

As we said in May, the cash awards will not be binding unless and until they have been approved by the Share Award Committee. The cash awards are also subject to your continued active employment (not on notice) and acceptance of the terms and conditions of the cash awards, which will be shared with you at that time.

As you can see on your own through examination of our Second Quarter 2011 earnings, Willis has performed well through the first half of the year. But we still have a long way to go to December to deliver on expectations, both from Wall Street and the internal targets we have set for ourselves. You know your role, and that of your team, in helping to achieve those goals. I am counting on you.

Your participation in the LTIP is a reminder that you can count on Willis. If we achieve our targets and you remain committed to our firm, the LTIP is designed to reward your commitment and build your wealth in the years to come.

Best wishes for an enjoyable remainder of the summer.

Sincerely,
[signature]
Joe Plumeri".

150 Joseph Plumeri, the Chairman and Chief Executive Officer of Willis Group Holdings PLC, wrote again in January 2012, in the following terms:

"January 2012

Dear Donald

Last year, you were among a small group of valued Associates invited to participate in our multi-year Long-Term Incentive Program (LTIP) aligned with our initiative to transform our company around The Willis Cause. The

specific role you play in our transformation made you eligible for our LTIP for 2011, which is one meaningful way in which your commitment to Willis allows you to share in our success going forward.

In my August 2011 letter to you about the LTIP, I outlined how your 2011 target award of $75,000, subject to approval by the Share Award Committee, would be implemented.

Today, I'm writing to let you know your 2011 LTIP Award, consisting of $37,500 time-based deferred cash and $37,500 performance-based deferred cash, has been approved by the Share Award Committee with a grant date of December 31, 2011. Formal grant documentation for your LTIP will be issued in the coming weeks. Please note your deferred cash awards will be converted to your local currency upon vesting if applicable.

The good news is that the cash award will have a more condensed vest schedule than originally anticipated. In the previously communicated new design of the plan, 50% of the cash award will vest December 31 of 2013 and 50% will vest December 31 of 2014. As previously described, the deferred cash award for the 2011 LTLP is 50% time-based with the remaining 50% subject to performance hurdles. The ultimate value of the performance based portion of the cash LTIP is based on our 2011 EPS and operating margins, which will not be available until February.

The cash awards are subject to your continued active employment (not on notice) and acceptance of the terms and conditions of the cash awards, which will be contained in the grant documentation.

Your participation in the LTIP is a reminder of the great value that Willis places in you. It is designed to reward your commitment over the long term and build your wealth in the years to come. The year we have just completed was challenging, but it is now history. I look forward to working together to achieve the best possible results for 2012.

Sincerely,
[signature]".

151 Mr Mitchell-Innes received and executed the "*formal grant documentation*" for the Long Term Incentive Program, which comprised an "*Agreement*" between Willis Group Holding PLC and Mr Mitchell-Innes to provide "*the opportunity for participants to share in the Company's success and to*

receive certain cash and equity incentives if certain performance and other criteria are attained".

152 The Agreement provided that Mr Mitchell-Innes had no right to the cash amounts until they became payable, and prior to "*actual payment*" the cash awards were an unsecured obligation of the Company.

153 The cash awards under the LTIP vested, as to 50% on 31 December 2013, and as to the other 50% on 31 December 2014.

154 Both of the cash awards under the LTIP had a vesting date after 31 July 2013. The program required Mr Mitchell-Innes to be in "*active employment (not on notice)*" at that time in order to remain entitled to the bonus, and the agreement provided that Mr Mitchell-Innes "*shall not be entitled to any incentive compensation of any kind in connection with time employed during the Notice Period*". It follows that no value in these cash amounts should be credited to Mr Mitchell-Innes' quantum of damages.

Retention award agreement

155 On 26 March 2010 Willis awarded Mr Mitchell-Innes a bonus for the 2009 calendar year of $70,000. The bonus was subject to a "*clawback of 36 months*", which I understood to mean that one thirty-sixth part would be repayable for each month between January 2010 and December 2012 inclusive that Mr Mitchell-Innes was not employed by Willis. December 2012 is the only relevant month, and given my finding about the likely notice date of 31 July 2013, there is no operative clawback. Although Mr Mitchell-Innes may be obliged under the bonus arrangement to repay the amount, his damages would be increased by the corresponding sum.

156 Mr Mitchell-Innes received a bonus of $50,000 for the 2010 year, under a similar arrangement. He had a repayment obligation in the event that his employment ended before 31 December 2013. For reasons given above, any repayment obligation is offset by damages for an equivalent sum,

since I have determined that Mr Mitchell-Innes would likely have remained employed until 31 January 2014. Thus, this bonus, and the repayment obligation in respect of it, does not impact on the proper amount of damages to be awarded.

157 Mr Mitchell-Innes also received a bonus of $45,000 for the 2011 year, subject to a repayment obligation if Mr Mitchell-Innes ceased employment before 31 January 2014. As I have determined that the employment of Mr Mitchell-Innes would likely end on 31 January 2014, there is a repayment obligation of eleven thirty-sixths of the $45,000 bonus, or $13,750.

158 However, there is the prospect that Mr Mitchell-Innes would have received a bonus for the 2012 year. I would not conclude that Mr Mitchell-Innes would receive a bonus if he were on notice, but I have assessed his likely notice date as 31 July 2013, months after the usual period (March to May) when annual bonuses are awarded. There was no evidence to indicate that annual bonuses, paid in 2010, 2011 and 2012, would not be paid in 2013. In these circumstances, I conclude that a bonus amount, subject to the usual repayment obligations, would have been paid to Mr Mitchell-Innes in 2013. But as Mr Mitchell-Innes, on my assessment, would cease employment on 31 January 2014, he would only be entitled to retain 13 months of that amount. This is roughly equivalent to the 11 months he would need to repay in respect of the 2011 bonus. In view of the decreasing level of bonuses in 2010 to 2012 and the apparent animus of Mr Wilkinson towards Mr Mitchell-Innes, I conclude that the entitlement of Mr Mitchell-Innes to retain a bonus for the 2012 year would approximately equal the amount of the clawback provision of the bonus for the 2011 year paid to Mr Mitchell-Innes in about March 2011, and no amount should be allowed.

159 Accordingly, the annual retention bonuses do not operate to increase, or decrease, the amount of damages.

Long Service Leave

160 The Long Service Leave provision in the contract provided:

> ***"Long Service Leave***
>
> *Long service leave will be treated in accordance with the relevant State legislation. For further details contact the Human Resources department."*

161 Mr Mitchell-Innes submitted that this clause gave him a contractual entitlement to long service leave, whereas Willis disputed that these words created any contractual obligation.

162 In my view, the use of the imperative term "*will*" in this clause indicates that the statutory long service leave obligation became contractual. Willis appears to have admitted this in the Amended Defence. I find that Willis was contractually obliged to treat long service leave in accordance with the relevant state legislation.

163 However, I do not think it matters whether the long service leave term was contractual (see also *Pacific Coal Pty Ltd; Ex parte CFMEU* (2000) 203 CLR 346 at [120], [212]). If according to the usual course of things or if it would be reasonably contemplated by the parties at the time of contract that Mr Mitchell-Innes would lose his long service leave benefits if he were wrongfully dismissed by Willis, as I find, then he is entitled to recover from Willis those benefits as damages, in accordance with the rule in *Hadley v Baxendale*, just as he is entitled to recover lost bonuses. The circumstance that bonuses or benefits may have been payable by another company of Willis or a third party, had Mr Mitchell-Innes continued in employment with Willis, is immaterial (cf *Amann* at [102] per Brennan J). So also it is immaterial that the lost benefits arose under statute.

164 What is material is whether Mr Mitchell-Innes retains a right under the statute. If he does, then he may not have suffered any loss of long service

leave benefits. But Willis disputes that he retains any rights under the statute.

165 Mr Mitchell-Innes' entitlements to long service leave are governed by s 4 of the *Long Service Leave Act 1955*, which relevantly provides:

> *"**4 Long service leave***
>
> *(1) Except as otherwise provided in this Act, every worker shall be entitled to long service leave on ordinary pay in respect of the service of the worker with an employer. Service with the employer before the commencement of this Act as well as service with the employer after such commencement shall be taken into account for the purposes of this section.*
> *(2)*
>
> *(a) Subject to paragraph (a2) and subsection (13) the amount of long service leave to which a worker shall be so entitled shall:*
>
> *...*
>
> *(iii) in the case of a worker who has completed with an employer at least five years service, and whose services are terminated by the employer for any reason other than the worker's serious and wilful misconduct, or by the worker on account of illness, incapacity or domestic or other pressing necessity, or by reason of the death of the worker, be a proportionate amount on the basis of 2 months for 10 years service.*
>
> *...*
>
> *(a3) For the purposes of subsections (2), (3) and (3A), **month** means 4 and one-third weeks.*
>
> *...*
>
> *(5)*
>
> *(a) Where the services of a worker are terminated otherwise than by the worker's death and any long service leave:*
>
> *(i) to which the worker was entitled has not been taken, or*
> *(ii) accrues to the worker upon such termination and has not been taken,*
> *the worker shall, subject to subsection (13), be deemed to have entered upon the leave from the date of such*

termination and the employer shall forthwith pay to the worker in full the worker's ordinary pay for the leave less any amount already paid to the worker in respect of that leave.

(b) Where a worker dies and any long service leave:

(i) to which the worker was entitled has not been taken, or

(ii) accrued upon termination of the services of the worker by reason of the worker's death and has not been taken, the employer shall upon request by the worker's personal representative pay to the worker's personal representative in full the ordinary pay that would have been payable to the worker in respect of long service leave less any amount already paid to the worker in respect of that leave.

(c) On the termination of the services of a worker who had taken any leave pursuant to subsection (3A) the worker's employer may, subject to this paragraph and subsection (13), deduct from any remuneration payable on such termination in respect of the worker's services:

(i) if the worker had not become entitled to any long service leave in the course of or upon the termination of the worker's services—the amount paid to the worker as ordinary pay for the leave so taken, or

(ii) if the worker had become so entitled—the amount paid to the worker as ordinary pay for the excess, if any, over the worker's total entitlement of the period or total of the periods of long service leave on ordinary pay given pursuant to this Act by that employer to and taken by the worker.

..."

166 Mr Mitchell-Innes is thus entitled under s 4(2)(iii) and 4(5) of the Act to an amount equal to two-twelfths times almost 105/120 months of salary, by reason of the period from 17 February 2004 until his wrongful termination on 9 November 2012. Willis submits that this entitlement is subject to termination of employment "*for any reason other than...serious and wilful*

misconduct", and in this case the employment of Mr Mitchell-Innes was terminated for "*serious and wilful misconduct*".

167 I do not accept this submission for two reasons, but I find that it is of no significance in any event.

168 I do not accept the submission because, first, Willis does not purport to terminate Mr Mitchell-Innes for "*wilful*" misconduct. Thus, if the reason relied upon by Willis is determinative of rights under s 4(2)(iii), still there is no "*wilful*" misconduct and Mr Mitchell-Innes' entitlements under the Act, having given at least five years service, remain unaffected.

169 Secondly, in my view the reason for Mr Mitchell-Innes' termination, for the purposes of s 4(2)(iii), is the actual reason established by the court, not the reason asserted by the employer. In this case, the actual reason is a wrongful termination in breach of the contract of employment, as I have found, and not termination for serious and wilful misconduct, which I reject for reasons given earlier, and because Mr Mitchell-Innes did not intend to be intoxicated at work (even accepting that his drinking earlier that day involved an exercise of will). I do accept, however, that Mr Mitchell-Innes' employment was terminated on 9 November 2012, and his statutory entitlements to long service leave cease to accrue on that date.

170 Section 12 of the *Long Service Leave Act 1955* provides that any worker may apply to the Local Court or the Industrial Relations Commission for an order directing the employer to pay to the worker the full amount of long service leave due. This provision - with its use of the word "*may*" and the reference to a novel order "*directing the employer*" - does not purport to provide the exclusive means of recovering unpaid long service leave entitlements. Once a debt arises by reason of non-payment of long service leave, that debt is, in my view, recoverable in a court having jurisdiction to give judgment in respect of the debt. That includes this Court. Further, as I have found the long service leave entielements are

contractual, Mr Mitchell-Innes is entitled to claim them as damages for breach of the obligation to pay.

171 For these reasons, the value of Mr Mitchell-Innes' statutory entitlements can be claimed in these proceedings.

172 The reason why the submission of Willis, in respect of serious and wilful misconduct, is of no significance is that, on my assessment Mr Mitchell-Innes is entitled to a slightly larger amount than his long service leave entitlement as a component of damages.

173 If Mr Mitchell-Innes had been terminated by notice on 31 July 2013, as I have assessed, he would have, by 31 January 2014, completed 17 days less than 10 years employment. Willis would not have terminated him for serious and wilful misconduct, but on notice. Mr Mitchell-Innes is entitled to claim as damages the loss of his anticipated long service leave benefits payable as at the assessed termination date of 31 January 2014.

174 The value of Mr Mitchell-Innes' likely entitlement under s 4(2)(iii) and 4(5) is for an amount slightly less than two months of his ordinary remuneration, according to the schedule below.

175 That amount of the long service leave entitlement of Mr Mitchell-Innes is $48,620.07.

Start of period	End of period	No. of days employed during period	No. of LSL weeks accrued in period	Annual base salary as at 1/7/12 ($)	Weekly base salary as at 1/7/12 ($)	LSL in lieu for period ($)
17/02/04	31/01/14	3637	8.6263	293,084.00	5,636.23	48,620.07

Rate of LSL weeks accrued per day employed	0.0023718

176 Thus, even though Mr Mitchell-Innes has a slightly smaller amount owing for long service leave entitlement under the Act, he is entitled to recover $48,620.07 as the value of one component of his loss arising from the wrongful termination.

177 Neither party submitted that the amount of damages should be increased in accordance with *Fox v Wood* (1981) 148 CLR 438, decreased because of a favourable taxation regime applicable to damages for wrongful dismissal (see *New South Wales Cancer Council* at 79-80, *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20 at 33), or should otherwise be adjusted to take account of tax payable. Accordingly, I have made no adjustment in that regard.

178 Although the parties have given evidence on the question of damages, the submissions on that aspect of the claim were necessarily general. It may be that my calculations are to some extent erroneous. For this reason, I will defer entry of the orders for two weeks to enable any party to make an application in respect of any error. If an application is filed, entry of judgment will be further deferred until the application is resolved.

179 The calculation of damages is accordingly as follows:

	($)
Lost salary	99,092.94
Lost retention bonus	118,182.00
Long Term Incentive Program payments	-
Retention award agreement	-
Long Service Leave entitlement	48,620.07
Total	**265,895.01**

180 Mr Mitchell-Innes is entitled to the statutory rate of pre-judgment interest, on these amounts up until today, from the following dates:

	Start of period	End of period	Amount of interest accrued during period ($)
Lost salary	7/1/13	8/12/14	12,732.76
Lost retention bonus	1/1/13	8/12/14	15,321.57
Long Service Leave	31/1/14	8/12/14	2,701.41
Total			**30,755.74**

The start dates for the retention bonus and long service leave component are the anticipated dates of payment. In the case of lost salary, the date chosen is the approximate date when half of the lost salary would have been payable.

181 Accordingly, the total amount of damages is $296,650.75 ($265,895.01 + $30,755.74).

182 As the plaintiff has been successful, he is entitled to costs in accordance with the usual rule, stated in r 42.1 of the Uniform Civil Procedure Rules 2005. However, this is likewise a matter that upon application will operate to stay entry of the costs order.

G. Orders

183 The orders of the Court are:

(1) Judgment in favour of the plaintiff against the first and second defendants in the sum of $296,650.75.

(2) Dismiss the cross-claim.

(3) Defendants to pay the plaintiff's costs.

(4) Stay the entry of order (1) for two weeks, and thereafter until further order in the event that an application is made to

correct an error in the calculation of the quantum of damages.

(5) Stay entry of order (3) for two weeks, and thereafter until further order in the event that an application is made in respect of the proper costs order.

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I certify that the previous 183 paragraphs
are the reasons for judgment
of his Honour Judge P Taylor SC.

Associate
8 December 2014