Policies That Don’t Bind: The Decision in *Akmeemana v Murray*

Craig Cameron*

*Akmeemana v Murray* [2009] NSWSC 979; BC200908870.

Introduction

From an employer’s perspective, policies are a formal method of conveying to employees, as well as assisting their compliance with, legal obligations in matters including workplace health and safety, grievance handling, sexual harassment, discrimination, trade practices, negligence and contract. Policies also serve to clarify the employee’s rights and responsibilities and enunciate accepted standards of conduct. As a separate document to each individual employment contract, policies offer consistency in regulating employment issues because they apply to all employees and provide the flexibility of adding to and varying them. Despite this physical separation between policy and contract, policies can bind the employer and employee as part of the employment contract.

The Supreme Court of New South Wales in *Akmeemana v Murray* recently considered the circumstances in which policies are incorporated into an employment contract. *Akmeemana* is one of few cases where the employer, not the employee, wanted a policy to have contractual force. In finding that the policies had no contractual force, Davies J in *Akmeemana* addresses four aspects relevant to the existing jurisprudence concerning policy and contract: incorporation of policy by reference; variation of policy; policy as implied term; and non-policy statements.

This article commences with a summary of the *Akmeemana* decision. I then engage in a brief review of the existing jurisprudence. This provides a useful context to the subsequent discussion of the four relevant aspects of the judgment. I conclude with a discussion of how *Akmeemana* fits within the existing jurisprudence and the lessons, some new and some repeated, it conveys to employers who wish to give contractual force to statements not expressed in the employment contract.

---

* Griffith Business School, Griffith University. I thank the anonymous referee for providing their insightful comments on a draft of this article. Any errors are my own.
1 See, eg, *Woolworths (t/as Safeway) v Cameron Brown* (unreported, AIRC PR963023, Lawler VC, Lloyd SDP and Bacon C, 26 September 2005).
3 Other case examples include *Hermann v Qantas Airways* (unreported, AIRC PR903096, Whelan C, 3 April 2001) (disciplinary policy, which included demotion, expressly incorporated in contract) and *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633; [2008] NSWSC 159; BC200805305.
Background to Akmeemana

Mr Akmeemana was employed as a recruitment consultant with Geller & Associates Pty Ltd (Geller & Associates) from 1 March 2007 to 1 November 2007. The employment contract dated 26 February 2007 contained the following relevant provisions:

3. Probation Period
   From your employment Commencement Date, you will be subject to a 4 month probation period.

4. Renumeration [sic]
   Your base is AUD $60,000 (gross) per annum . . . Additional to your base salary is the superannuation component of 9%, equivalent to approx AUD $5,400 per annum.
   Probation Period Commission – Payable on Invoices that have been Paid . . .
   Any changes to compensation package will be added as an appendix to this contract after being agreed and signed by both parties.

9. Role and Responsibilities
   Your specific role and responsibilities are set out in the Position Description. However, you must also:
   (a) follow all lawful directions at your supervisor/s and/or Geller’s officers and management; . . .
   (c) comply with Geller’s policies and guidelines, as varied or issued from time to time, including, without limitation to, security, workplace discrimination, harassment, alcohol and drugs, and acceptable uses of online services;  

Commission payments by Geller & Associates were a substantial component of Mr Akmeemana’s compensation package (as revealed by Mr Akmeemana’s subsequent unpaid commission claim for the months of August, October, November and December 2007 totalling $52,616.70).  

The commission entitlement was premised on Mr Akmeemana recruiting a job candidate and placing them with the employer client of Geller & Associates. For each client matter, Mr Akmeemana compiled a ‘placement folder’ which included paperwork associated with the placement that Geller & Associates required Mr Akmeemana to keep and/or complete.

No policies or guidelines existed at the commencement of Mr Akmeemana’s employment. However, a ‘Policies and Procedures Manual’ (manual) was published in June 2007. The final pay section under the heading ‘Joining or Leaving Geller’ in the manual (Final Pay policy) stated:

Employees will receive their final pay in their account, via EFT, on their last working day . . . . No payment will be made for commission on invoices not settled prior to your last day.

On 4 June 2007, as part of a series of emails arising from a request by Mr Akmeemana about his commission, Mr Josh Geller, a director of Geller & Associates sent the following email message to Mr Akmeemana (the email):

---

5 Akmeemana v Murray [2009] NSWSC 979; BC200908870 at [3].
6 Ibid, at [47].
7 Ibid, at [4].
Its [sic] essential that all the relevant Admin is organised prior to the candidate starting for various reason [sic] . . . . Please be aware that Commission is only payable on candidate deals that are finalised (ie, Admin done) prior to start date . . .

The relevant ‘admin’ was documentation relating to the placement of job candidates with clients compiled in the placement folder. Further, Mr Geller told Mr Akmeemana during his employment that ‘it was such an important part of the business if he wasn’t able to complete the paperwork then we wouldn’t be paying commission’ (the statement). Mr Akmeemana ceased employment on 1 November 2007 following disputes with Mr Geller that were unrelated to the legal proceedings.

Mr Akmeemana brought proceedings in the Local Court of NSW against Geller & Associates, claiming inter alia breach of contract. The breach of contract claims concerned the failure to pay commissions, superannuation on commissions and the failure to provide Mr Akmeemana 4 weeks’ notice of termination when Geller & Associates allegedly repudiated the employment contract. The learned magistrate rejected the breach of contract claim, with the partial exception of superannuation. While superannuation was payable on the commissions earned by Mr Akmeemana, the learned magistrate determined that the court had no jurisdiction to award the unpaid superannuation as damages for breach of contract. No reasons were provided for this determination. The superannuation finding was Mr Akmeemana’s first ground of appeal.

The second ground of appeal, being the subject of this case note, concerned the learned magistrate’s finding that Geller & Associates had no liability to pay the commissions in respect of various placements of candidates that Mr Akmeemana had instigated (totaling $52,616.70). In particular, the learned magistrate held that cl 9(c) of the employment contract incorporated the policy by reference. Further, the email was a lawful direction relating to Geller & Associates’ business pursuant to cl 9(a) of the employment contract. Mr Akmeemana failed to complete the paperwork with some placement folders prior to the candidate’s start date with the employer client and as such, the commissions on those placements were not payable to Mr Akmeemana. An alternative ground against Mr Akmeemana, namely that Geller & Associates was not liable to pay commission on candidate placements where invoices had not been settled prior to Mr Akmeemana’s last day of employment (as per the Final Pay policy), was raised by Geller & Associates in its Notice of Contention to the Supreme Court of NSW and by Mr Akmeemana as part of the second ground of appeal.

Mr Akmeemana succeeded on the second ground of appeal, which thereby entitled him to the unpaid commission. Justice Davies held that:

8 Ibid, at [60].
9 Mr Akmeemana also made unsuccessful claims against Geller & Associates for breach of ss 52 and 53B of the Trade Practices Act 1974 (Cth) and against three directors of Geller & Associates under s 75B of that Act for their alleged involvement in the contraventions by Geller & Associates. Mr Akmeemana did not appeal this part of the learned magistrate’s decision.
10 [2009] NSWSC 979; BC200908870 at [49].
11 Ibid, at [11(1)(b)].
(1) The manual, a document formulated approximately 3 months after Mr Akmeemana commenced employment, was a unilateral variation to the employment contract and not incorporated by reference;

(2) There was no implied term of the contract which entitled Geller & Associates to withhold payment of commission on invoices not settled prior to Mr Akmeemana’s last day of employment; and

(3) Mr Akmeemana’s failure to complete the placement folders prior to the candidate’s start date did not disentitle him to commission payments on those placements. No such term existed in the employment contract and the email and the statement represented a unilateral variation to the employment contract.

The decision of Davies J encounters the existing jurisprudence relating to policy and contract. Before exploring his Honour’s reasons in more detail, Akmeemana is placed in its jurisprudential context.

**Existing Jurisprudence**

A policy may be contractually binding if incorporated by reference in the employment contract (express incorporation) or as an implied term of the contract (implied incorporation). Even if policies have no contractual force, they may be relevant to determine whether the employer breached the implied term of mutual trust and confidence or whether the employee failed to abide by a lawful instruction of the employer in breach of contract. A policy can be expressly excluded from or included in the employment contract by a statement in the policy or possibly the contract to that effect. For example, the relevant policies in *Yousif v Commonwealth Bank of Australia* had no contractual force because the introduction to the policy manual stated that ‘the manual is not in any way incorporated as part of any industrial award or agreement entered into by the Bank, nor does it form any part of any employee’s contract of employment’.

Many employment contracts include a clause which requires the employee to ‘abide by’ or ‘comply with’ the employer’s suite of policies, as varied or added from time to time. The question is whether the policy matter the employee or employer seeks to enforce is incorporated by reference in the

---

12 *Thomson v Orica Australia Pty Ltd* (2002) EOC 93-227; 116 IR 186; [2002] FCA 939; BC200204194 at [146] per Allsop J; *McDonald v South Australia* (2008) 255 LSJS 279; 172 IR 256; [2008] SASC 134; BC200803642 at [347] per Anderson J. This position was not considered on appeal, the Full Court of the Supreme Court of South Australia finding that the employment contract did not include an implied term of mutual trust and confidence — *South Australia v McDonald* [2009] SASC 219 at [274] per Doyle CJ, White and Kelly JJ.

13 *Woolworths (t/a Safeway) v Cameron Brown* (unreported, AIRC PR963023, Lawler VC, Lloyd SDP and Bacon C, 26 September 2005) at [25]; *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633 at 669 per Rothman J; [2008] NSWSC 159; BC200805305; *Akmeemana v Murray* [2009] NSWSC 979; BC200908870 at [59] per Davies J.


17 Ibid, at [96]–[97] per North J.
contract. Since the leading decision of Riverwood International Ltd v McCormick,\(^{18}\) three key factors have emerged to determine this issue. The first factor is the language of a policy clause in a contract. The prevailing position is that a policy clause which requires the employee to ‘abide by’ or ‘comply with’ policies means that the employee is bound by obligations in the policies but is also entitled to receive the benefits in those policies.\(^{19}\) Although not expressed as being subject to the policy, the employer has expressed contractual obligations by virtue of the employer offering, and the employee accepting, express contractual rights.\(^{20}\)

The second factor is the language of the policy sought to be relied on. An objective test is used — would a reasonable person in the position of the promisee conclude that, having regard to the surrounding circumstances, the promisor intended to be contractually bound by the statement?\(^{21}\) Context is critical. An employer ‘commitment’ to a workplace issue may,\(^{22}\) or may not, be expressly incorporated into the contract\(^{23}\) depending on the circumstances. Descriptive language in the form of direction or advice\(^{24}\) and statements which reveal the employer’s aspirations on a particular topic are not generally contractual.\(^{25}\) While a signed policy is a surrounding circumstance which is suggestive, but not conclusive of a contractual purpose\(^{26}\) and can confirm that the employee has read and understood the policy,\(^{27}\) an unsigned policy does not reverse a finding that the employer intended to be contractually bound.\(^{28}\) The final factor is the time the employee receives the policy. If the employee receives the policy after signing the contract, the employee’s inability to

---


\(^{19}\) Ibid, at [106] per North J; at [150] per Mansfield J; Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120; BC200706296 at [131] per Marshall J; Nikolich v Goldman Sachs JBWere Services Pty Ltd [2006] FCA 784; BC200604574 at [246] per Wilcox J.

\(^{20}\) Ibid, at [107] per North J. Alternatively the obligation could be implied to give business efficacy to the contract: Dare v Hurley (2005) EOC 93-405; [2005] FMCA 844; BC200505928 at [121] per Driver FM (breach of disciplinary procedures in policy).


\(^{22}\) Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120; BC200706296 at [24]–[31] per Black CJ (workplace health and safety).


\(^{24}\) McDonald v Parnell Laboratories (Aust) Pty Ltd (2006) EOC 93-483; (2007) 168 IR 375; [2007] FCA 1903; BC200711032 at [68]–[72] per Buchanan J (policies were designed to provide direction to managers in the performance of their HR responsibilities, in this case, performance counselling policy).

\(^{25}\) Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120; BC200706296 at [37]–[38] per Black CJ; at [159]–[160] per Marshall J (harassment policy).

\(^{26}\) Ibid, at [21] per Black CJ.

\(^{27}\) Dare v Hurley (2005) EOC 93-405; [2005] FMCA 844; BC200505928 at [120] per Driver FM.

\(^{28}\) Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120; BC200706296 at [121] per Marshall J; Dare v Hurley (2005) EOC 93-405; [2005] FMCA 844; BC200505928 at [120] per Driver FM.
knowingly commit to the policy terms suggests that the parties did not intend to be contractually bound.\textsuperscript{29}

As previously noted, many contracts include a policy clause which enables an employer to unilaterally vary or introduce policies. The law imposes a further restriction on the express incorporation of a policy matter which is either a variation to a current policy or is part of a new policy issued to existing employees. This restriction does not require the employer to obtain the employee's agreement to the change, but rather satisfy an implied term.\textsuperscript{30} Justice Mansfield in \textit{Riverwood} provides the leading statement on this issue:

Its power to change its policies, or to introduce new policies, from time to time would be constrained by an implied term that it would act with due regard for the purposes of the contract of employment: eg \textit{Hospital Products Ltd v United States Surgical Corporation} [1984] HCA 64; [1984] 156 CLR 41 at 63, 137–8, so it could not act capriciously, and arguably could not act unfairly towards the respondent: cp. \textit{Ansett Transport Industries v Commonwealth} [1977] HCA 71; [1977] 139 CLR 54 at 61. It might also be a power which, by implication, must be exercised reasonably having regard to the nature of the contract and the entitlements which exist under it: \textit{Renard Constructions (ME) Pty Ltd v Minister for Public Works} (1992) 28 NSWLR 234 at 279–80 per Handley JA.\textsuperscript{31}

As an alternative to incorporation by reference, a relevant policy may be an implied term of the contract. Much of the case law in this area addresses whether a severance entitlement is a term implied in fact or by law.\textsuperscript{32} Justice Lindgren in \textit{Riverwood} provides a well supported summary of the relevant legal principles.\textsuperscript{33} There is no term implied by law in all employment contracts requiring the employer to make severance payments when an employee is terminated due to redundancy,\textsuperscript{34} irrespective of whether the employer has a redundancy policy.\textsuperscript{35} Nor is it likely that a court will imply a term in fact that

\textsuperscript{29} McDonald v Parnell Laboratories (Aust) Pty Ltd (2008) EOC 93-483; (2007) 168 IR 375; [2007] FCA 1903; BC200711032 at [67] per Buchanan J; refer also Nikolich v Goldman Sachs JB Were Services Pty Ltd [2006] FCA 784; BC200604574 at [247] per Wilcox J.


\textsuperscript{31} Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193; [2000] FCA 889; BC200003663 at [152] per Mansfield J. See also Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] FCAFC 120; BC200706296; at [122] and [124] per Marshall J; Health Administration Corporation v Crocker [2004] NSWIRComm 163 at [34] per Marks and Haylen J.


\textsuperscript{34} Alternatively, the employee may have a statutory entitlement. The National Employment Standards, as established under the Fair Work Act 2009 (Cth), provide minimum redundancy entitlements to national system employees (with defined exceptions).

\textsuperscript{35} Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193; [2000] FCA
the parties must abide by a policy.\textsuperscript{36} However, a term may be implied in fact by a course of dealing, for example, publication of a redundancy policy on the employer’s intranet and payment of severance to the employee consistent with its redundancy policy and without any suggestion that the payment was ex gratia.\textsuperscript{37} It is important to note that a policy impliedly incorporated into the contract would also need to satisfy the objective test discussed above to be contractually binding.

Any policy, non-policy statement or variation to a policy not expressly or impliedly incorporated into the contract can still have contractual force if it is a variation to the contract. A variation requires agreement, whether that is expressed by the parties or implied by conduct. However, agreement by the employee requires more than awareness of and non-objection to the policy.\textsuperscript{38}

The decision of Davies J in \textit{Akmeemana} addresses four relevant aspects of the existing jurisprudence: incorporation of policy by reference; variation of policy; policy as implied term; and non-policy statements.

\textbf{Decision of Davies J}

\textbf{Incorporation by reference and variation}

Geller & Associates argued that the Final Pay policy was expressly incorporated into the employment contract based on cl 9(c) of the employment contract and the subsequent publication of the manual.\textsuperscript{39} Justice Davies rejected Geller & Associates’ argument. His Honour treated the manual as a variation because it was formulated after the contract was entered into.\textsuperscript{40} The Final Pay policy would not have contractual force unless its incorporation was consistent with cl 9(c) of the employment contract. The language of the policy clause revealed two inconsistencies. First, the matters listed in cl 9(c) — ‘security, workplace discrimination, harassment, alcohol and drugs, and acceptable uses of online services’ — were limited to employee behaviour in the workplace. In this context, Davies J considered that the words ‘without limitation’ could not then be ‘read in an unqualified way’.\textsuperscript{41} Second, the word ‘comply’ suggested that the employee must ‘do a positive act or refrain from doing a positive act’.

Applying the two inconsistencies together, the Final Pay policy was not incorporated by reference in the employment contract.
because Mr Akmeemana was not required to act or behave in any way. Rather, the policy dealt with the actions of Geller & Associates in relation to commission.  

Justice Davies then applied the oft-cited passage of Mansfield J in Riverwood concerning the limitations on an employer’s power to change or introduce new policies. Although not explicit in the judgment, it appears that Davies J considered that even if the Final Pay policy overcame the above inconsistencies, such an addition was not contractually binding because it:

would not be to ‘act with due regard for the purposes of the contract of employment’ and would be to ‘act unfairly towards the’ employee, it would be to act ‘capriciously’ and would not be exercising the power in cl 9(c) to implement policies and guidelines in a reasonable fashion.

Implied term

Geller & Associates argued, in the alternative, that ‘Probation Period Commission — Payable on Invoices that have been Paid’ in cl 4 of the employment contract implied that the placement folders had to be completed and the invoice on a placement had to be paid prior to cessation of employment. Justice Davies did not specifically determine whether the completion of placement folders was an implied term in fact, instead addressing the placement folders as an issue of contract variation (refer heading ‘Non-Policy Statements’ below). He did, however, find that the right to withhold commission on invoices that were not settled prior to Mr Akmeemana’s last day of work was not implied in cl 4 of the employment contract. The right did not satisfy any of the legal tests for the implication of terms in fact. While the tests were not elaborated on or explicitly applied in the judgment, he noted that the tests were ‘usefully collected’ by Lindgren J in Riverwood. We can surmise that according to Justice Davies, the right was not ‘obvious’, did not ‘go without saying’, nor was it ‘necessary to give business efficacy to the contract’.

Within that collection of tests, it appears Davies J was particularly mindful of, or at the very least, his judgment is consistent with, Brennan J in the High Court decision of Codelfa Construction Pty Ltd v State Rail Authority (NSW). Justice Brennan held that having construed the express words in a contract, a court will not ‘take its pen and add a clause merely because it

---

43 Ibid.
44 Ibid, at [53] and discussed above n 34.
46 Ibid, at [50].
47 Ibid, at [56]–[58].
49 Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 at 227 per Mackinnon LJ; [1939] 2 All ER 113; referred to in Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193; [2000] FCA 889; BC20000366 at [67] per Lindgren J.
51 (1982) 149 CLR 337; 41 ALR 367; BC8200083.
thinks the addition would be reasonable or fair or prudent’. 52 His Honour also emphasised that ‘the necessary foundation for the creation of contractual rights and obligations is the agreement of the parties’. 53 In Akmeemana, Davies J considered irrelevant the fact that it may have been unreasonable for Geller & Associates to pay the commission on invoices paid after Mr Akmeemana’s termination, given the ongoing work required after the candidate is placed with the client employer. 54 Further, cl 4 of the employment contract provided that any changes to Mr Akmeemana’s compensation package required a separate signed agreement by the parties. The Final Pay policy, which imposed conditions on commission payments, was not subject to any separate agreement. 55 Justice Davies concluded that:

If there were to be conditions other than those contained in cl 4 concerning when and in what circumstances commission should be paid, those matters needed to be set out and agreed in the Employment Contract. 56

Non-policy statements

Geller & Associates relied on cl 9(a) of the employment contract, the email and the statement to argue that Mr Akmeemana’s failure to complete the placement folders disentitled him to the commission payment on those placements. Justice Davies rejected the arguments based on the fundamental principle that a contract cannot be varied without the agreement of all parties. As a starting point, Davies J noted that non-completion of the placement folders was a failure to comply with a lawful direction in breach of cl 9(a) of the employment contract and could lead to disciplinary action such as termination or being placed on another probationary period. However, there was no express term in the contract entitling Geller & Associates to withhold payment for a breach of cl 9(a). 57 Simply put, a breach of contract by Mr Akmeemana did not absolve Geller & Associates of its obligation to pay commission.

Justice Davies then turned to the email and the statement. Although the email and statement made it clear that commission was only payable on completing the paperwork associated with candidate deals, both items were not communicated to Mr Akmeemana until after he signed the employment contract and commenced employment. As with the manual, the email and statement did not form part of the contract, but were an attempt by Geller & Associates to unilaterally vary the employment contract. 58 Justice Davies concluded that the ‘link between the payment of commission and the completion of the placement folders was not a term of the employment contract’. 59

53 Ibid.
54 Akmeemana v Murray [2009] NSWSC 979; BC200908870 at [58] per Davies J.
55 Ibid, at [57].
56 Ibid, at [58].
57 Ibid, at [59].
58 Ibid, at [60]–[61].
59 Ibid, at [62].
Akmeemana — Implications

The Akmeemana decision is significant, not in the sense that it breaks new legal ground, but that it applies various aspects of the existing jurisprudence concerning the relationship between policy and contract. In the process, the judgment of Davies J confirms the existing jurisprudence and reveals lessons to employers when drafting policy clauses in employment contracts and policies that they intend to be binding.

Akmeemana confirms the significance of the language used in a policy clause when determining the issue of incorporation by reference. On a practical note, employers are well advised not to list policy subjects in a policy clause, albeit they may have intended that it be a non-exhaustive list. Otherwise, a court may find it is only those particular policy subjects, or a restricted category of policies (e.g., those dealing with employee behaviour, employee entitlements or employer obligations) that are potentially binding. If employers want to distinguish those policy subjects that are and are not expressly incorporated into the contract, the binding and non-binding policy subjects could be listed in a manual that contains the policies, or alternatively, specified as binding or not in each policy document.

Akmeemana is one of only two cases that have approved and applied the principles enunciated by Mansfield J in Riverwood to a policy variation or addition. In Health Administration Corporation v Crocker, a case decided in the NSW unfair contracts jurisdiction, a policy variation was unfair because it imposed additional costs on the employee’s contractual right to a fully maintained motor vehicle used for private purposes. Similarly the Final Pay policy would have acted unfairly towards Mr Akmeemana. The policy disentitled Mr Akmeemana to commission on invoices paid on or after his last day of work. The Akmeemana decision confirms that unless the employer has good reason, a variation to, addition or removal of a policy which has the effect of reducing or restricting employee entitlements is unlikely to be contractually binding.

The Riverwood principle, as affirmed by Akmeemana, has significant implications within the current economic environment in which employers are reviewing their incentive/bonus schemes. The incentive scheme typically sits outside the employment contract so that the employer has the flexibility to modify it. The power to modify is expressed in the incentive scheme itself or the employment contract. Employers may wish to modify the structure of the scheme due to operational reasons such as redundancies, changes in client payment arrangements or client management, employee turnover, relocations, or the employer’s financial position in general. For example, modifications may have the effect of increasing some employees’ remuneration packages while decreasing others. Unless the disadvantaged employees provide oral or written agreement, a court may find that the modification is not contractually binding on them because the employer exercised its power unfairly, capriciously or unreasonably. As the court assesses the employer’s power to modify on a case by case basis, a finding in

60 [2004] NSWIRComm 163.
61 For example, see Nikolich v Goldman Sachs JBWere Services Pty Ltd [2006] FCA 784; BC200604574 at [11]–[33] per Wilcox J.
the individual employee’s favour may not necessarily apply to all employees. In my previous example, such a finding may have the effect of creating two policies: the disadvantaged employees bound to the original version and the remaining employees, including new employees, bound to the modified version. Subsequent modifications could then cause further policy adaptations. Employers must be acutely aware of the concepts of reasonableness, fairness and capriciousness encapsulated in the *Riverwood* principle when proposing to vary policies, particularly employee entitlements.

From a human resources perspective, *Akmeemana* emphasises the importance of having a comprehensive set of policies in place on commencement of the employment relationship. The email and statement, both non-policy items, and the Final Pay policy attached legitimate conditions precedent to making commission payments, namely, completion of all paperwork associated with the candidate in the placement folders and settlement of invoices prior to Mr Akmeemana’s last day of work. Had these conditions been included in a Geller & Associates policy at the start of Mr Akmeemana’s employment, then the policy provisions would only be subject to the test of incorporation by reference in the employment contract. Instead, the email and statement were subject to the common law rules of contract variation and the Final Pay policy was subject to the rules of incorporation by reference, including the restriction on policy variation outlined by Mansfield J in *Riverwood*. The framing of the condition precedent in the email and statement raises an important lesson for employers. If employers intend to bind employees to particular arrangements, they should be expressed in a policy document, or alternatively, the employment contract. Inclusion in a policy enables the arrangement to be promulgated to all employees and gives the employer two ways of binding an employee to the arrangement: by employee agreement, which would constitute a variation to the employment contract; or by express or implied incorporation of the policy into the contract. Planning, drafting and implementing policies can be a time consuming and costly exercise for employers. But as *Akmeemana* demonstrates, failure to do so can lead to a far more costly outcome.