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Précis Paper

Recent Employment Cases

A discussion about three recent cases concerning contemporary issues in employment law.

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Recent Employment Cases

In this edition of BenchTV, Tass Angelopoulos (Head of Legal Services, Employsure Law, Sydney) and Troy Plummer (Practice Lead, Employsure Law, Sydney) discuss three recent cases concerning contemporary issues in employment law.

Qantas Stand Down Case

1. The case of *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCA 656 concerned section 524 of the *Fair Work Act* 2009 (Cth) which is a provision relating to stand-down of employees. This section gives employers, in certain circumstances specified in that provision, the right to stand down employees without pay.
2. The section provides a statutory exception to the common law principle that an employer has no right to stand down or suspend an employee without pay which was established by *Hanley v Pease and Partners Limited* [1915] 1 KB 698 and confirmed in Australia in the case of *Re BWIU* (1979) 41 FLR 192.

Section 524 of the *Fair Work Act 2006 (Cth)*

3. Section 524 of the *Fair Work Act* 2006 (Cth) is a permanent provision which provides that when certain criteria are met, there is no payment to which an employee is entitled when they are stood down.
4. Section 524 provides that an employer may, under this section stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances;
    a. industrial action other than industrial action engaged in by the employer
    b. a breakdown of machinery or equipment if the employer cannot reasonably be responsible for the breakdown or
    c. the stoppage of work for any cause for which the employer cannot be reasonably held responsible
5. Section 524(3) of the *Fair Work Act* 2006 (Cth) provides that if an employer stands down an employee during a period under section 524(1) the employer is not required to make any payments to the employee during that period. An employer can only stand down an employee if they cannot be usefully employed. If the employer is able to obtain some benefit or value for the work that can be done by the employee, then the employer would not be able to stand down the employee.

6. In the Qantas stand-down case, subsection c was relied upon as covid19 stoppages of work were necessary for health reasons and because of this Qantas could not reasonably be held responsible for the stoppage of work.
7. The issue in question in this case was whether or not an employee, subject to a section 524 stand down can be paid for personal leave and carers leave during the period of the stand down. It was necessary for the Court to determine what takes priority, that is whether the sick leave entitlement provision of the Fair Work Act which is a National Employment Standard override the provision on stand down.
8. In coming to his decision, His Honour determined that there was a twofold test for stand down. First, it was necessary to determine the purpose. In this case it was to provide financial relief to an employer to allow them to not pay employees when there is a situation, not of its own making, whereby there is no work for the employees.
9. The second limb of the stand down test concerns protecting employees from the usual circumstances that would flow from a termination of employment.
10. It has been established in *Hanley v Pease and Partners Limited* [1915] 1 KB 698 that the normal rights of continuing service of employment would continue such as accrual of leave.

Purpose of Personal or Carers Leave under the Fair Work Act

11. In *Mondelez v Australian Manufacturers Workers Union* [2019] FCAFC 138 the court found that the purpose of section 96 of the Fair Work Act 2009 (Cth), which deals with entitlements to be paid whilst on personal leave was to create a form of statutory income protection for employees during periods of illness or unexpected injury.
12. The Mondalez characterisation of personal and carers leave as income protection leads to two logical conclusions about the effect of an entitlement to be paid when somebody is already on stand-down;
    a. Firstly, the income protection component assumes that the employee is earning an income and has something to protect and
    b. the second element looks to undermine the capacity of a stand down to provide relief from paying wages to the employer.
13. It would undermine the purpose of section 524 for employees to be paid personal and carers leave whilst a 524 stand down is in effect and as such an employee is not taken to be stood down under section 524 during a period when an employee is
    a. taking paid leave that is authorised by the employer of
    b. is otherwise authorised to be absent from his or her employment.
14. In this decision, the court determined that if a person is already on stand down and then they seek personal carers leave, the personal carers leave will not be made. If a person had already entered into a period of personal carers leave and then the stand down was

effective, they would be entitled to continue to receive the personal carers leave until that has exhausted itself.

The National Employment Standards leave provisions

15. The basis for compassionate leave is similar to personal carers leave under the statutory framework so it will have the same application.
16. An employee may still go on paid annual leave if they have been stood down as the general rule is that an employer cannot unreasonably refuse an employee's request to go on leave.
17. During a period of unpaid stand down, public holidays qualify as an authorised absence from employment and are not deemed to be unpaid stand-downs
18. In a broader context, this case is important for employers in understanding that when they put a 524 stand down in place, it does not terminate the employment relationship. It also provides for continuity of service and leave entitlements continue to accrue throughout the period. It will also count as service for whether or not employees are entitled to a certain amount of redundancy pay or the notice that applies in relation to termination of employment

Rossato case

19. In the decision of *Workpac v Rossato* (2020) FCAFC 84, the Full Federal Court reinforced what was said in an earlier decision of *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 on the meaning of casual employment under the Fair Work Act.
20. Workpac applied directly to the Federal Court seeking declarations on the state of the employment relationship that it had with Mr Rossato. It hoped that the Court would find that Mr Rossato was a casual employee for the purpose of the National Employment Standards under the Fair Work Act. Mr Rossato worked for Workpac for 6 consecutive contracts of employment over his period of employment. All contracts described Mr Rossato as a casual. In one contract, the contract identified the components of the National Employment Standards. However, none of these provisions were enough for the court to find that Mr Rossato was a causal employee
21. If Mr Rossato is described as a casual employee but is not in fact a casual employee for the purposes of the National Employment Standards then he did not have access to many National Employment Standard entitlements such as annual leave, paid personal carers leave, paid public holiday leave etc. The Court held that Workpac had breached the National Employment Standards and could have penalties imposed upon it for doing so.

The meaning of 'casual'

22. The real issue in this matter was what does it mean to be a casual under the Fair Work Act. The reason that this issue arose is that the Fair Work Act uses the word casual but does not define it anywhere. In *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, the court found that the Award definition of casual employment is solely for the award purposes and for the award entitlements. It cannot be used to define the term casual under the Fair Work Act and in particular the NES. In this case, the Court repeated what the earlier Skene decision said, and it said that for the purposes of the NES, a casual employee is someone who is determined by reference to the common law meaning of casuals. That is that to be a casual, the employee has no firm commitment from his or her employer to continuing an indefinite work according to an agreed pattern of work that is that there is no firm advance commitment to employment.
23. One must look at the real substance, the practical reality and the true nature of the relationship which includes and regards the way in which the work was actually carried out.

Restitution Arguments

24. The restitution arguments advanced in the Rossato case concerned three main grounds
    a. offset
    b. Mistake under contract and
    c. Regulation 2.93A Fair Work Regulations
25. The argument made by Workpac was that they employed Mr Rossato as a casual employee by mistake. The court held that they always intended to employee him as a casual because they paid him a loading.
26. In relation to the regulation arguement, The Regulation sought to say that if you employ someone as a casual employee and give them a clearly identifiable casual loading to offset NES entitlements, but in reality the employment situation the employee was in fact a permanent employee and not a casual employee and the person makes a claim to be paid in lieu of one or more of the NES then the employee cannot pursue the NES.
27. When employees make claims for entitlements they do not seek a damages claim for the loss, they seek the actual entitlement. The Regulation does not deal with entitlement and only effectively deals with a claim for damages for the loss. Mr Rossato did not seek damages for the loss, he only sought the entitlement he was entitled to be paid.
28. The critical matter however was the issue of offset. The case of *Poletti v Ecob (No. 2)* (1989) FCA 779 states that if in doing an analysis of what the employee would be entitled under the award compared to what they have been paid under the contract of employment, if the contract of employment equals or betters what the award entitlements would individually be comprised of, then the offset can be applied and the employee cannot pursue the other benefits.

29. What is different in this case is that the offset is not just about payments and renumeration, it concerned leave entitlements. The court held that you cannot use offset for leave entitlements. Because the benefit under the NES for sick leave, annual leave is entitlement to be absent from work and when that happens you get paid. The offset can only address the payment of nonpayment component, but it can never address the right to absent from work itself.

Hiro Sushi case

30. The case of *Fair Work Ombudsman v HSCC Pty Ltd* (2020) FCA 655 does not introduce much new law but it does round up many principles on penalties under the Fair Work Act. The case concerns principles on penalties for claims made under the Fair Work Act.
31. This was an agreed judgement, there was no contest on the facts. Ultimately, it was admitted that there was a various amount of breaches of the Fair Work Act, the Fair Work Regulations and the Award.
32. The Hiro Sushi respondents kept different books and when questioned by the Fair Work Ombudsman, they provided false information on multiple occasions.
33. The penalties that were sought by the ombudsman against the businesses were as follows
    a. Two of the respondents were fined $225,000.00 each
    b. The third corporate respondent was fined $150,000.00
    c. The fourth and fifth respondents, who were the two directors and 50% shareholders in the three corporate entities were each fined $85,000.00
    d. The sixth respondent who was a day to day manager in the business was penalised $75,000.00
    e. The seventh and eighth respondents who implemented the practices within the business were penalised $16,000 and $30,000 respectively
34. Section 550 of the *Fair Work Act* 2006 (Cth) provides that the corporate entity is the primary wrongdoer and the secondary wrongdoers can also have penalties imposed on them by section 550 where a person is knowingly concerned in a contravention. The court ultimately decided on penalties that were within the prescribed range suggested by the Fair Work Ombudsman and respondents.

Principles when considering penalties

35. *Kelly v Fitzpatrick* [2007] FCA 1080 came up with a list of non-exhaustive considerations to be taken into account to be applied to Fair Work act breaches such as the nature and extent of the conduct which led to the breaches, the circumstances in which the conduct took place, the nature and extent of any loss or damage that was sustained as a result of

the breaches whether it be similar previous conduct by the respondent, whether the breaches were properly distinct or arose out of the one course of conduct, whether or not the breaches were deliberate, whether the party who committed the breach took any corrective action and the need for specific and general deterrence.

36. When assessing penalties for the corporate offenders, the court applied the principles of totality and proportionality and also looked at whether the breaches were distinct or arose out of one course of conduct. What the court looked at in determining the appropriate penalty was that multiple corporate vehicles were used to effect the same fraud in three different geographical areas with different employees. There had to be a recognition that each of these entities had separately been involved and one single penalty could not have been given for the corporate offenders.
37. In looking at the personal respondents, the court looked at the culpability of each individual.

Penalties that can be applied under the *Fair Work Act*

38. The individual maximum penalty for a single breach is $12,600 for a real person. The maximum penalty for a corporation is $63,000.00 in respect of each contravention
39. Breach of the Award and Breach of the National Employment Standards are strict liability and whether the breach is intentional not is irrelevant.
40. The case also involved an agreement to implement order requirements. The parties agreed that the Fair Work Ombudsman would effectively determine a methodology and then have the corporate respondents implement a 6 month audit, starting 28 days after the orders were handed down by the court, within 60 days of the audit finishing they had to report back to the Fair Work Ombudsman. The court specifically gave its grant of liberty to apply to the Fair Work Ombudsman if there was non-compliance around the audit process.

Takeaways

41. The Qantas decision is particularly relevant in the current scenario as it has such wide spread effect and gave some clear guidance on personal leave and carers leave and how it is to be treated in the face of a stand down.
42. Rossato is a further refining of the Skene decision and will have an impact in the short to medium term. The Government has signaled an intent to address it legislatively and has also indicated an intent to intervene before the High Court as well as working committees trying to work out how to deal with the casual issue
43. The Hiro Sushi does not tread a lot of new ground insofar as factors for imposing penalties however it is most significant for the post decision audit that will take place. It is the court stepping into police the ongoing conduct of respondents.

BIOGRAPHY

Tass Angelopoulos

Head of Legal Services, Employsure Law, Sydney

Tass Angelopoulos has over 30 years' experience as a specialist workplace and employment lawyer. Having obtained his expertise working as an in-house advisor, as a barrister and as a solicitor from international to boutique law firms, he now leads an innovative employment law practice – Employsure Law.

He is admitted to practise in Australia and New Zealand and member of the 2020 Employment law Committee with the NSW Law Society.

Tass is a strategic advisor who partners with clients to assist them to develop their long erm and short term strategies, to resolve the employment and workplace law issues that arise.

Troy Plummer

Practice Lead, Employsure Law, Sydney

Troy is a highly experienced lawyer with extensive business experience. This enables him to bring a business focused approach to his role. This business focused approach allows him to engage strongly with various stakeholders to ascertain a clear understanding of the pathway to the desired outcomes for each stakeholder and this advise the business on the likely outcomes and various risks associated with the possible scenarios.

Having worked across various Australian and international jurisdictions, Troy has a demonstrated capacity to quickly adapt to different legislative frameworks and incorporate this information into targeted, specific advice to serve the business's needs.

Troy has a highly analytic mind allowing him to look closely at business issues, and changing situations and law, to identify potential implications arising from compliance requirements as well as business risk factors that may need to be addressed.

Troy brings a wealth of experience in the negotiation and drafting of purchase, supply, infrastructure, IT and various other forms of commercial contracts that requires him to clearly understand what has been agreed and to ensure that the business requirements have been clearly articulated into the agreement, as well as ensuring its legal rights have been protected.

BIBLIOGRAPHY

Legislation

Fair Work Act 2009 (Cth)

Fair Work Regulations 2009 (Cth)

Cases

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited [2020] FCA 656

Workpac v Rossato 2020 FCAFC 84

Fair Work Ombudsman v HSCC Pty Ltd [2020] FCA 655

Hanley v Pease and Partners Limited [1915] 1 KB 698

R e BWIU (1979) 41 FLR 192

Mondelez v Australian Manufacturers Workers Union [2019] FCAFC 138

WorkPac Pty Ltd v Skene [2018] FCAFC 131

Poletti v Ecob (No. 2) (1989) FCA 779

Kelly v Fitzpatrick [2007] FCA 1080