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CASENOTE: Cummins South Pacific v Keenan [2020] FCAFC 204

Mr Andrew Keenan (also '**Employee**' and '**Applicant**') commenced employment as an engineer with Cummins Darlington in Britain in 1981 in a business involved in the manufacture and service of engines. From about 1994 the Applicant was employed by a related company, Cummins South Pacific Pty Ltd ('**Employer**'), and the Applicant relocated to Australia. At termination, the Applicant was a senior manager, enjoying a remuneration package of greater than $200,000, and which could exceed $300,000 if bonus targets were reached.

The Applicant initially sought relief in the Federal Circuit Court ('**FCCA**') for breaches of the *Fair Work Act* 2009 (Cth) ('**FW Act**'), for relief under the LSL Act. This casenote deals only with the FW Act aspects of the Cummins Appeal.

Applicant's claim

The Applicant claimed that his termination of employment in November 2015 was because of one or more of the several 'complaints and inquiries' which the Applicant had apparently made before the termination. In addition, further complaints of adverse action arose from placing the Employee on a 'performance improvement plan' or PIP and commencing an ethics complaint against him.

On 14 September 2018, after seven days of hearing and extensive submissions, Judge Wilson of the FCCA found that Cummins breached section 340(1) of the FW Act by each of the six instances of adverse action pleaded by Mr Keenan entered judgment for the Applicant; on 8 March 2019 his Honour ordered reinstatement (effective from 25 March) and substantial compensation. The Employer appealed to a Full Court the Federal Court of Australia ('**FCA**'), claiming that the FCCA judgment was in error.

A. Majority judgments in Cummins Appeal

The Appeal was heard by **Bromberg, Mortimer and Anastassiou JJ**. **Bromberg J** wrote the lead judgment:

- noting that first and second grounds of appeal challenge Judge Wilson's finding that section 340(1) was contravened; and
- considering the two aspects, being complaints were not founded in or upon a source of entitlement as the phrase 'able to make a complaint' (as that expression is used in section 341(1)(c)(ii) of the FW Act); and second, that each of the complaints were not a 'complaint' within the meaning of that expression in section 341(1)(c)(ii).

Bromberg J analysed authorities regarding 'complaints and inquiries' in section 341 of the FW Act. His Honour's judgment is a review of current case law: including Shea [1] and more recent cases such as Bowd [2] and Full Court views such as PIA. [3]

[1] Shea v TRUenergy Services Pty Ltd (No 6) [2014] FCA 271.
[2] The Environmental Group Ltd v Bowd [2019] FCA 951, per Steward J.
[3] PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15.

His Honour, noting some of the different views of how the legislation should be applied, found that it was:

> . . .*apparent that the meaning of s*[ection] *341(1)(c)(ii) as described by prior authority, is clouded. There is uncertainty as to how the observations in Shea are to be understood. In my respectful view that uncertainty is largely the product of competing views as to which interpretation of the holding in Shea should be preferred in circumstances where those observations are not an appropriate starting point for an analysis of the proper construction of s 341(1)(c)(ii). That is because, for the reasons given, neither interpretation of the holding in Shea is supported by the text, context or purpose of s 341(1)(c)(ii) of the FW Act.*

Bromberg J found error based upon the primary judge's views of the evidence, and particularly the reverse burden contained in section 361 of the FW Act. His Honour noted that the trial judge took a 'global view' of the reasons for the Employee's dismissal, dealing with only one of the complaints alleged in any detail.

Bromberg J found that little of Judge Wilson's reasoning was laid bare in the reasons for his Honour's decision, aside from the conclusion that his Honour was not convinced of the assertion by decision-makers that termination occurred 'by reason of' performance. The primary judge's reasons addressed the complaints alleged, without differentiating between the six separate complaints made. Only one witness was referred to in any detail: and the judge did not deal with the positive case from the Employer (which had gone into evidence, setting out performance reasons for dismissal). His Honour found that the question as to whether the prohibited reason was a 'substantial and operative' reason, as set out in Barclay,[4] had not been addressed.

Noting the disbelief of the decision maker was a weighty consideration, Bromberg J found:

> . . . *neither that observation* [regarding the disbelief of the decision-maker] *nor the s*[ection] *361 statutory presumption itself, relieves a court of the need to make all of the necessary inquiries and consider all of the evidence probative of whether the reason asserted has been negated by that evidence. Whilst the statutory presumption casts an onus on the respondent to satisfy the court on the evidence before it that the asserted reason has been negated, it does not require that finding to be based solely on the evidence of the decision-maker or to be based solely on the evidence called or otherwise put before the court by a respondent*.

Bromberg J found irrelevant questions including about fairness, about competence and management style of executives at the Employer's business; this involved error in the primary judge's reasons. Bromberg J set the primary judgment aside in substantial part. Whilst writing a separate judgment, **Mortimer J** concurred with the orders and with Bromberg J's reasons – albeit noting additional authorities in her Honour's decision.

B. Anastassiou J's dissenting view

Justice Anastassiou dissented both as to the reasoning regarding section 341 (and 'complaints and inquiries') and as to the orders concluded by both Bromberg and Mortimer JJ.

His Honour found that the first four complaints (both of which had been found to be complaints within the meaning of Shea by Bromberg and Mortimer JJ) did not constitute a

[4] Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32; (2012) 248 CLR 500.

workplace right and were not capable of being causative of adverse action. Anastassiou J found that these complaints were not 'able to be made' within the meaning of Shea, as they lacked a source of entitlement: essentially complaints were 'dependent upon the identification of an anterior right or entitlement to complain'.[5]

Significance of the appeal decision

The Cummins Appeal decision is notable, for at least two reasons: first, because the substantial relief (totalling over AU$1 million) ordered on 8 March 2019 was unusual; and this relief was then quashed by the Full Court on appeal. Second, because the primary judge did not content himself with merely a substantial payment, but ordered reinstatement to the Employee's previous position with the Employer.

It may be presumed that each of these factors had a role in the Employer's decision to appeal.

Unfortunately, the Cummins Appeal deals with the familiar 'complaints and inquiries' authorities; without doing more than merely continuing the controversy regarding the Shea litigation and the split between authorities which Bromberg J described as 'cloudy'. The diffuse meaning of section 341(1)(c) of the FW Act arises because of the terms; and disparate views of the legislation may be clearly identified both in the Cummins Appeal and other Full Court decisions such as Whelan [6] and PIA.[7]

Such a split is likely to be a feature of both first-instance decisions and Full Court decisions until ruled upon conclusively by the High Court. To my knowledge, no special leave case is pending or sought on this question at present.

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[5] Cummins Appeal, [285] per Anastassiou J.
[6] Cigarette & Giftware House Pty Ltd v Whelan [2019] FCAFC 16; (2019) 268 FCR 46.
[7] Above, n3.