Employment Law Conference - Ultimate Case Update - Leo Cussen Centre for Law

AUTHORITIES AND COMMENTARY

1.	Mayson v Mylan Health Pty Ltd [2020] FWC 1404	Per Colman DP: Section 789FC application for anti-bullying order. The DP considers: - Complaints of bullying from 2014 and 2017 against employer and 8 named persons. The Appl's solicitor made anti-bullying application for interim order preventing dismissal, after undertakings declined; - question of whether the source of power (such as section 589(2)) and the purpose of section 789FF, balanced against the *prima facie* case alleged give either need for relief, or a discretionary case for it. - Decision: the DP declined to consider section 589(2) of the FW Act as a source of power, and considered the purpose of section 798FF – [16], [21]; - an interim order can be made underpart 6-4 of the FW Act, but only if preconditions are met: [21]; - an order preserving subject matter, (as orders have been made) in the nature of administrative injunctions: [25]. The FWC may make a decision only if satisfied the worker has been subject to bullying at work, and there is a risk the bullying will continue: [26]. Any other order would be beyond power.
2.	De Souza v Metro Trains Melbourne Pty Ltd [2019] FWC 3625	Per Young DP: Extension of Time application in general protections/ dismissal. The DP considers: - On 15 March 2018, employer informed De Souza that they had no work for him based upon his fitness and knee injury. - Discussions continued into April 2018. Termination occurred effective 1 January 2019. - Decision: the DP considered the exceptional circumstances existed: [38]. - EoT granted, for the application to be lodged by 13 March 2019.
3.	Western Union Business Solutions (Australia) Pty Ltd v Robinson [2019] FCAFC 181; 290 IR 144	Per Kerr, O'Callaghan and Thawley JJ: Consideration of what constitutes a disability for the purposes of Part 3-1 of the FW Act, and particularly the operation of section 351: - Facts: Robinson (also '**Employee**') was employed as a Client Executive with Western Union (also '**Employer**'). In September 2016, Mr Robinson commenced absence on personal leave supported by medical certificates. The Employer sought an independent medical examination ('**IME**'). Robinson did not

		respond. Robinson failed to attend an IME by 30 January 2017. On 8 May 2017, the Employer terminated Robinson's employment. - First instance: Flick J heard the case at trial – see [2018] FCA 1913. His Honour found contravention of section 351 – as the Employer took adverse action against Robinson because of his mental disability. Flick found that Robinson's disability could be severed from the manifestation of the disability. - Decision on appeal: Kerr J wrote one judgment; and the remaining judges wrote separate reasons. - All judges found that whilst manifestation of a disability is part of a physical or mental disability for section 351 purposes, it is possible to differentiate. This means that the 'manifestations' and the 'consequences' of such a disability are distinct. In advising clients, the distinction between a 'manifestation' of a disability and a 'consequence' of a disability may not always be straightforward. It is likely that this decision is not the Federal Court's final word on section 351.
4.	Wunungmurra v East Arnhem Regional Council [2019] FWC 1931	Per Bissett C: Consideration of whether it is possible to revisit the exercise of discretion under section 596 of the FW Act, and particularly the revocation of permission: - On 13 June 2018, the employer (also 'Council') sought and obtained permission under section 596 to be represented by Sheldon Smith of Latitude 12, a HR company in Darwin; - orders were made for filing of submissions on remedy. Minter Ellison filed those submissions, despite permission being granted to Smith and Latitude 12. United Voice, the Appl's union wrote and objected to the new appearance; the Commissioner responded by listing the application; - Decision: consideration of the complexity of the contested reinstatement; - no warrant to re-exercise discretion.
5.	Tracey v BP Refinery (Kwinana) Pty Ltd [2019] FWC 4113	Per Binet DP: This is the 'Hitler parody' case. It has sequels in the Full Bench ([2020] FWCFB 820) and prerogative writ decision ([2020] FCAFC 89): - Mr Tracey (also '**Employee**') was involved in bargaining for an agreement to replace a 2014 enterprise agreement between BP and its employees. The Appl's wife (Mrs Tracey) gave evidence that on 3 September 2018 she alone produced a video drawn from the German language movie 'Downfall' which parodied enterprise agreement negotiations. The parody depicted some of the negotiating for BP as Hitler or figures in Nazi Germany, using captioned text over German dialogue;

		- the parody video was disseminated by the Employee showing it to other workers, and by placing it on his Facebook social media account;
		- on 1 November 2018 Mr Tracey was stood down for reasons including his creation and sharing and distribution of 'highly inappropriate material'; on 18 January 2019 the Employee was given 4 weeks' notice and terminated;
		- Decision: there being no jurisdictional objection, the main question was whether the dismissal (in the circumstances) was 'harsh'. Binet DP found:
		  - there was an issue as to whether Mrs Tracey's evidence was supportable [73]. Inferentially, Mr Tracey had a hand in the making of the video;
		  - there was evidence that persons at BP found the video offensive – and in fact emailed each other to this effect [93] [94];
		  - a parody is not a reason to find something not offensive: [99] The Hitler Video had the potential to undermine, demean and denigrate BP senior managers: [112];
		- having regard to section 387 of the FW Act, Binet DP found the dismissal of Mr Tracey was not harsh, unjust or unreasonable. The DP dismissed the application: [209].
		
		Note: this decision was later overturned on no clear basis in [2020] FWCFB 820. See [38]-[40]. The major reason seems to be the view of the Full Bench that the parody was not offensive.

6.	Thai v Email Ventilation Pty Ltd [2019] FWC 4116	Per Sams DP: This is a case about alleged genuine redundancy – claim the employee was redundant, and a jurisdictional objection based upon this jurisdictional fact: - Mr Thai (also '**Employee**') was employed as a sheet metal worker. On 30 July 2018, the sole director and owner gave notice of termination by text message; - the DP noted two irreconcilable objections to the application; firstly, that there was no dismissal; secondly, his dismissal was a case of genuine redundancy; - Decision: the DP disposed of the 'redundancy' argument shortly. There was no evidence that the Appl's job was 'no longer required': [44]. An assertion that the employer was in financial straits requires clear and cogent evidence of that fact: [44]. - In any event, no consultation occurred about the alleged redundancy: [45]-[46]. - The DP found the dismissal was 'harsh' (at [72]) and programmed orders to determine compensation.
7.	Wallace v AFS Security 24/7 Pty Ltd [2019] FWC 4292	Per Cambridge C: This is a case about the operation of the casual provisions:

		- Mr Wallace was purportedly a casual employee and security guard. The employer was a small employer providing security services and covered by the Security Services Industry Award 2010: [7]-[8]. - The employee was employed for 2 years: [8]. The employer relied upon the length of service provisions in section 384, and particularly section 384(2), which includes service 'as a casual'; when calculating length of service. 'Regular and systematic' engagements are not included in service as a 'casual', where the employee had a reasonable expectation of continuing employment on a regular and systematic basis: [32] - The employee's work involved setting monthly or two-monthly rosters: [9]. Because the rosters were issued monthly or bi-monthly, this determined the employees' work, including the Appl: although the Appl and other Security Guards could swap rostered shifts, the method of engagement via regularly issued rosters means that the employment of the applicant was established on a regular and systematic basis: [33]. This disposed of the jurisdictional objection. - As an aside, the facts of this case may have consequences based upon Workpac v Skene and the Rossato decisions set out below.
8.	Zirilli v StarTrack Express Pty Limited [2019] FWC 3557	Per Hamberger SDP: This is a case about poor performance, in which no warnings were given: - Mr Zirilli (also '**Employee**') was a supervisor. Part of his duties included supervising and (on a relief basis) signing off on employees' timesheets, called 'Checker' duties: [6]; - the Appl signed off a significant number of time sheets as compliant where they were not. A single disciplinary meeting occurred [27]-[28]. - Decision: based upon the Employee's unblemished record (see [42]) and the lack of advance notice of the reason for dismissal, the Senior Deputy President found that the Appl's dismissal was harsh. The respondent should not have dismissed him without giving him a warning and a chance to improve: [43].
9.	Pezzimenti v Rotary International [2019] FCCA 1854	Per Judge Driver: This is a general protections case, which resulted in a high payment of compensation to the Appl: - Mr Pezzimenti (also '**Employee**') was employed by Rotary in Parramatta, NSW as a senior executive: [7]. On 30 June 2017, the Employee's employment was terminated for (amongst other things) breaches of confidence and failing to meet a performance improvement plan, or PIP: [19]. Mr Pezzimenti claimed that his dismissal included reasons relating to

		complaints made, in particular against Mr Huerta: [2]. Rotary denied this. - The substance of Mr Pezzimenti's complaint concerned Mr Huerta's pursuing the PIP process. The conclusions Mr Huerta reached in the PIP process, provided "cover" for the eventual likely termination of employment: [46]. - Under the PIP, the Employee was required to satisfy objectives, known as 'deliverables'. On 28 February 2017, the Employee met with Mr Huerta. Huerta stated only one 'deliverable' was outstanding: [30]. - On 5 April 2017, Huerta met with the Employee again. The position had changed since February 2017: Huerta stated that he was unable to assess progress on one deliverable and the Employee had failed to achieve three other deliverables: [42]. Mr Pezzimenti was suspended and asked to leave: [42]. The employee issued a proceeding on 11 April 2017: [1]. - On 27 June 2017 during the time when the Appl's evidence was due in the Court, Rotary sent the Applicant two 'show cause' letters seeking a Skype meeting to discuss why the employment should not be terminated. Mr Pezzimenti did not attend and was dismissed: [50]-[51], [66]. - <u>Decision:</u> Whilst identifying performance concerns, his Honour found that there was a change of attitude to Mr Pezzimenti after the 13 December 2016 complaint was made against Mr Huerta, and the commencement of proceedings: [63]. - The Court found contravention of section 340 of the FW Act, and ordered compensation equivalent to $205,000.
10.	One Dream Enterprises Pty Ltd c Simmons & Ors [2019] VSC 304	Per McDonald J: This is an interlocutory injunction, based upon an allegation of confidential information: - Ms Simmonds, Mr Vercher and Mr Risos (also '**Employees**') were employed by the Plaintiff in its real estate business. After setting up a rival business, called 500 Keys, the Plaintiff sought relief against the Employees for using confidential information to obtain 14 Landlords and one land vendor as clients: [5]. - The Employees denied having access to confidential information. - <u>Decision:</u> After reviewing alternative explanations as to how the 14 Landlords came to the Employees' new business (including advertising, and both Ms Simmonds' and Mr Vercher's long involvement in Werribee real estate), McDonald J found there was an arguable case of breach, but that it was not a strong arguable case: [20]. - His Honour found that the balance of convenience was against granting an injunction: [21]. The reasons for this involved the delay (of more than six months), the fact that relief would be substantially discounted and that relief sought was too broadly described in the summons: [24]-[25]. McDonald J dismissed the Plaintiff's summons [26].

11.	Workpac Pty Ltd v Rossato [2020] FCAFC 84	Per Bromberg, White and Wheelahan JJ: This is the sequel to the Workpac v Skene decision (Full Court) of 2018: - Mr Rossato (also '**Employee**') was employed in a series of engagements by Workpac, a labour hire provider. There were six consecutive contracts: [13]. As with Mr Skene in the related case, Rossato worked for years with no break in service; and his hours were set by rosters that set shifts months in advance. - The Employer sought declarations, including that payment for entitlements such as annual leave, personal/ carer's and compassionate leave were not owed to Mr Rossato: see [13]. - The payments to Mr Rossato during the six contracts assumed he was a casual employee and not entitled to leave pursuant to sections 86, 95 and 106 of the FW Act. If Mr Rossato was 'other than a casual employee, then Workpac sought either set-off (by deducting casual loadings from amounts owed) or restitution of such amounts. Decision - The three judges wrote separate, but cohesive decisions - Each found the essence of 'casualness' in employment is a lack of advance commitment to work. Whilst Bromberg J went further (and included the times and dates for this work) otherwise, the judges of the Court applied a previous authority of Doyle v Sydney Steel. - As for restitution and 'set off' of amounts paid against the entitlements, this was essentially declined. Their Honours found it was not sufficiently certain that Workpac's mistake in considering Rossato to be a casual employee was the reason that it paid him the loading. As for the loading paid, it was not capable of set off, as it was paid 'in lieu' of leave and not to compensate; the actual payments were not severable or distinguishable from the 'all in' rate paid to Rossato.

TIM DONAGHEY

LATHAM CHAMBERS

AICKIN CHAMBERS

3 June 2020