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CASENOTE: ***Kelly v Atanaskovic Hartnell Corporate Services Pty Limited (No 2) [2022] FedCFamC2G 112 (31 March 2022)***

The Applicant, Mrs Kelly (also '**Employee**') was employed by Atanaskovic Hartnell Corporate Services ('AHCS' or 'the **Employer**') in April 2004. Mrs Kelly was the General Manager of Atanaskovic Hartnell, a law practice in Sydney. Mrs Kelly was responsible for human resources, administration, information technology and finance and gave notice of her resignation from her employment in August 2016. The Employer provided services to the legal firm, Atanaskovic Hartnell, and Mrs Kelly reported to one of the partners, Mr Atanaskovic.

Background - claims against Employer
After the resignation, Mrs Kelly sued the Employer and other related parties, for the following:

a. for unpaid entitlements, including unpaid salary, annual leave and long service leave ('**Entitlements Claim**');
b. for alleged breach of the general protections under section 340 of the *Fair Work Act* 2009 (Cth) ('**FW Act**') ('**GP claim**s');
c. an alleged breach of duty implied term in her Employment Contract which required AHCS to avoid exposing her to any unnecessary risks of injury to her person or reputation ('**Contract Claim**'); and
d. against Mr Atanaskovic, for being an accessory to the Entitlements Claim (being in breach of the FW Act) and for being an accessory to the GP Claims,

(jointly, '**Claims**'). In addition, the Employer cross-claimed against the Employee.

I turn now to each of the Claims, in overview.

A. Entitlements Claim
At the date of her resignation, the Employer owed the Employee about $132,000 in unpaid wages, annual leave and long service leave. The Employee alleged that non-payment was a breach of both the FW Act *per se*, and of the general protections provisions of that legislation. The Employer alleges that it is not required to pay these amounts, because the quantum of damages it seeks in its cross-claim is greater than the quantum of the entitlements, and it is entitled to a set-off.

In its defence, the Applicant says that non-payment of entitlements is a civil penalty provision and attracts interest as well as a penalty.

B. Other Claims against the Employer
The GP claims and the Contract Claim are based upon the same facts: from July 2014 to August 2016, Mrs Kelly made a series of complaints and inquiries in relation to her employment and, in particular, in relation to threats made by Mr Atanaskovic to dismiss Mrs Kelly or employ her on less favourable terms (including by reducing her salary). In terms, these were said to be a contravention of section 340 of the FW Act; and to sound in a breach of the Contract Claim.

C. Cross-Claims
The cross-claims were:

a. the failure by the Employee to provide correct documentation for AH LLP, (a partnership founded by the Employer in the United Kingdom), to enable the principals of the Respondent to practice in that jurisdiction; and
b. a claim that the Employee was required to give notice to a legal publisher, LexisNexis ('**Lexis**') of not renewing a contract for its legal publishing services and did not do so.

Hearing – the Claims and cross-claims

Judge Rolf Driver heard the Employee's application and the cross-claims. This casenote only deals with the 'FW Act' or GP claims in that proceeding, of which there are two set out below.

Entitlements Claims

(i) Entitlements and adverse action

His Honour heard that Mr Atanaskovic had 'complete discretion' as to whether to pay entitlements, including the entitlements sought by the Employee. At the same time, Judge Driver took a dim view of the cross-claims – finding that they were not articulated at the time conduct was engaged in; that no loss had been suffered flowing from Mrs Kelly's conduct; and they were unmeritorious claims pursued with a view to avoiding the claim for entitlements. On this basis, his Honour found that the Employer took adverse action against the Employee (by not paying entitlements) and that Mr Atanaskovic was knowingly involved in that contravention.

(ii) Complaints and adverse action

A contrasting picture emerged of the 'complaints and inquiries' said to be made under section 341 of the FW Act. Judge Driver considered nine separate complaints and inquiries and found:

(a) each of the complaints were made by the Employee;
(b) each of the complaints made constituted the Employee exercising a workplace right; and
(c) Mr Atanaskovic was not told by other members of the firm about the existence and substance of all (or any) of the complaints, because those members did not wish to aggravate or create a dispute with the senior partner;

For this reason, each of the 'complaints' was the reason for the Employer's taking adverse action. Rather than Mr Atanaskovic engaging in conduct 'because of' the workplace right, or being liable as an accessory, Judge Driver drew an important distinction:

- the campaign of denigration of Mrs Kelly (which ranged from in-person critique, to systematic email abuse) indicated not any link to the 'complaints' made, but rather spoke to the fact that Mr Atanaskovic did so (and encouraged others to do so) because he had a grievance with Mrs Kelly that escalated over time;
- Mr Atanaskovic held a grudge against Mrs Kelly (which I accept) based on his view that she was incompetent and his wish to be rid of her – not on the complaints she had made concerning him; and
- Mr Atanaskovic's conduct was as principal of the law firm, not as accessory. Thus, the distinction between *employer conduct* and accessorial liability drawn by the FW Act made general protections an inapt framework to fasten legal liability onto either the Employer or Mr Atanaskovic.

Each of the adverse actions based upon 'complaints' was dismissed.

Rationale of the decision

This case is unusual, in several respects. First, it took nine hearing days.

Next, it is clear that a poisonous atmosphere existed (in which the Employee was belittled and mocked, both by Mr Atanaskovic and others in the firm). And yet, this overwhelming antagonism was itself sufficient to be the 'cause' of the adverse action of which the Employee complained, and not the 'workplace right' alleged by the Employee.

A further significant part of this decision is that, leaving aside some of the salacious and intimidating facts in this case, it is a further illustration that any general protections claims are specialised, designed to fit very confined facts, and not at all easy for applicants to win. Thus 'general protections' are to this extent, not at all general: even in this case, for an applicant who has been extensively bullied. It is a warning for applicants to reduce their cases to the essence, and not to attempt to shoe-horn a particular scenario into general protections.

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