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CASENOTE: ***TechnologyOne Ltd v Roohizadegan [2021] FCAFC 137 (5 August 2021)***

Mr Roohizadegan ('**Employee**') was dismissed by his employer ('**Employer**') in 2019. Upon termination, the Employee sued the Employer and Mr Di Marco,[1] the then CEO of the Employer, in the Federal Court for contractual relief, and for breach of the adverse action provisions under the *Fair Work Act* 2009 (Cth) ('**FW Act**'). The Employee claimed to have been terminated after making complaints about his workplace, including threats and bullying.

Kerr J heard the trial, and (based upon seven of the 10 complaints pressed at trial) awarded[2] substantial relief, including penalties, future economic loss, damages for breach of contract, and other heads of damage. Mr Di Marco was found liable as an accessory. The Employer and Mr Di Marco appealed to the Full Court of the Federal Court of Australia.

-Basis of the appeal –
The Appellants relied upon two grounds of appeal, in respect of the allegations of adverse action, which were:

a. the primary judge failed to provide adequate reasons for his conclusion that the appellants did not displace the statutory presumption under section 361 of the FW Act that the adverse action taken against the Employee was for a prohibited reason; and
b. the learned primary judge did not address the essential question in the trial – that question was both evidentiary and statutory. The question was whether the Appellants had established that the adverse action was not taken for a reason proscribed by the FW Act, or for reasons which included such a reason – by reference to all the evidence. In particular, the evidence which corroborated Mr Di Marco's evidence was not dealt with by Kerr J.

Other appeals ground concerned payment of contractual entitlements and incentive payments.

The Employee relied upon an amended cross-appeal – seeking further relief not merely to September 2020, but to the Employee's probable retirement in 2027, and seeking to have the Court find the award of general damages was manifestly inadequate. The Employee relied upon a notice of contention, to the effect that if the learned primary judge erred, then the conclusion that the Appellants contravened the FW Act should be upheld. This was said to follow from the basis that each of three other people employed by the Employer had a material effect on Mr Di Marco's decision to terminate the Employee's employment.

Appeal

The Full Court of the Federal Court was made up of Rangiah, White and O'Callaghan JJ. The Full Court provided in the form of a joint judgment a detailed examination of the evidence (including material redacted during trial) in respect of each of the seven complaints which were said to be the workplace rights upon which the trial judge's decision was based. They then examined Mr Di Marco's evidence and the treatment of it by the trial judge.

-The Full Court's examination-
The Full Court found:

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[1] The Employer and Mr Di Marco are referred to as 'the Appellants' below.
[2] Roohizadegan v TechnologyOne Ltd (No 2) [2020] FCA 1407; (2020) 301 IR 1, per Kerr J.

- based upon prior authority,[3] there is an obligation upon a trial judge to give sufficient reasons in respect of critical questions; this must show the judge's path of reasoning; and
- where there is a factual contest, at the very least the judgment should set out evidence which is not preferred, the evidence preferred and the basis for so preferring.

In this case, the Full Court found the trial judge's reasons inadequate. Rather than explain the findings of credit, his Honour's finding that the making of the complaints was Mr Di Marco's reason for the termination of employment because he knew that the Employee had made the complaints. In so deciding, Kerr J failed to make the critical finding about reasons and in particular whether the Appellants had discharged the evidentiary burden contained in section 361 of the FW Act.

The Full Court also found that in not dealing with the reasons advanced by Mr Di Marco at trial, the trial judge's process of fact-finding miscarried. This when combined with the Full Court finding (also based on authority) that it should not make its own findings of fact, militated towards a remitter.

Based upon this reasoning, the Full Court allowed the appeal, dismissing the cross-appeal and the notice of contention, and setting the orders made by the trial judge aside. The process was remitted to the Federal Court, with an order made that there be a new trial.

-Rationale of the decision-
This case is a marathon, even by the standards of the Federal Court.

First, it resulted in lengthy reasons from both the trial judge and the Full Court – in the case of the appeal, over 220 paragraphs but in the case of the trial judge, near to 1000. Next, it was lengthy in that the trial alone occupied more than two weeks' worth of the Court's sitting days. By virtue of the remitter, this effort and expenditure has been undone and will now (unless further leave to appeal is sought) must be re-done.

Little in the way of new law or principle was created in the Roohizadegan appeal, but it does contain extensive guidance as to the minimum required for a general protections decision involving complaints. For this reason alone it is a case deserving of attention. This decision is likely to be a touchstone in most general protections cases, for some time to come – whether or not the Employee's advisors recommend to pursue a special leave application or otherwise.[4]

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17 September 2021

[3] See Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 260 (per Kirby P); 268-269 (per Mahoney JA); Beale v GIO NSW (1997) 48 NSWLR 430 at 444 (per Meagher JA).
[4] See for example https://www.afr.com/technology/techone-faces-high-court-challenge-over-bullying-dismissal-claims-20210906-p58p5j (reviewed on 16 September 2021).