FEDERAL COURT OF AUSTRALIA

Qube Ports Pty Ltd v McMaster [2016] FCAFC 123

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| Appeal from: | *McMaster v Qube Ports Pty Ltd* [2015] FCA 1385  |
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| File number: | VID 253 of 2016 |
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| Judges: | **ALLSOP CJ, JESSUP AND BROMBERG JJ** |
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| Date of judgment: | 9 September 2016 |
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| Catchwords: | **INDUSTRIAL LAW** – *Fair Work Act 2009* (Cth), s 340(1) – appeal of primary judge’s holding that adverse action was taken because of the exercise of a workplace right – where respondent employee refused a direction to ‘upgrade’ and perform the work of a higher grade – where appellant employer dismissed the employee for reasons including the employee’s refusal to upgrade – whether primary judge erred in construing the applicable enterprise agreement as providing the employee a workplace right to refuse to upgrade – the enterprise agreement authorised the employer to require an employee to perform work within the employee’s recognised competency and for which the employee was appropriately skilled – the employee had no workplace right to refuse to upgrade – appeal allowed  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340, 341, 360, 361  |
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| Cases cited: | *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245*Board of Bendigo Regional Institute of Technological and Further Education v Barclay* (2012) 248 CLR 500*Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243*Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150*Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156*National Wage Case August 1989* (1989) 30 IR 81*National Wage Case February 1989 Review* (1989) 27 IR 196*Ostrowski v Palmer* (2004) 218 CLR 493 *Qube Ports Pty Limited (TT Line VIC & TAS) & Maritime Union of Australia Enterprise Agreement 2012*JJ Macken, *Award Restructuring* (Federation Press, 1989)*Stevedoring Industry Award 2010*  |
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| Date of hearing: | 16 August 2016 |
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| Registry: | Victoria |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 65 |
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ORDERS

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|  | VID 253 of 2016 |
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| BETWEEN: | QUBE PORTS PTY LTD ACN 123 021 492Appellant |
| AND: | TORREN MCMASTERRespondent |

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| JUDGES: | ALLSOP CJ, JESSUP AND BROMBERG JJ |
| DATE OF ORDER: | 9 September 2016 |

THE COURT ORDERS THAT:

1. Appeal allowed.
2. The declaration in paragraph 1 of the orders of the Court made on 16 March 2016 be set aside and in lieu thereof the application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1. I have read the reasons to be published of Jessup J and Bromberg J. I agree with the conclusions of both that the primary judge erred in the proper construction of cl 8.4 of the relevant enterprise agreement and that the Company had authority to require Mr McMaster to upgrade to Grade 5. I note, however, that their Honours reach this conclusion for different reasons concerning the meaning of the first and second sentences of cl 8.4. Thus, it is necessary for me to say something as to this construction issue.
2. I agree that it is both unnecessary and unwise to say anything about the fifth ground of appeal. I agree with what Jessup J has said about the fourth ground of appeal. I will, however, direct some short remarks to one aspect of the second ground of appeal.

### The first ground of appeal – the construction of cl 8.4 of the enterprise agreement

1. The proper approach to the ascertainment of the meaning of any part of the enterprise agreement involves the examination of the words used in the provision in question in the context of the whole agreement. Clause 3 of the agreement was entitled “Intent of this Agreement”. It has five sub-clauses that express important principles and aims of the parties (the Company and the Union) in managing the workplace. The five sub-clauses bear full statement:

3. INTENT OF THIS AGREEMENT

3.1 This agreement is directed towards the achievement of the following objectives:-

(a) Improve near miss, accident and incident reporting and safety management;

(b) Zero lost time in injuries;

(c) Zero damage;

(d) Customer retention and growth;

(e) Business expansion; and

(f) Strict adherence to the terms and conditions contained within this Agreement.

3.2. The parties recognise that the essential to achieve a spirit of trust and co-operation between employer representatives and employees, as required within the overall objectives of the Company through the provision of:-

(a) A safe work place;

(b) Job security;

(c) A constructive and co-operative employer and employee relationship;

(d) Competitive remuneration;

(e) A non-discriminatory approach;

(f) Regular and genuine communication with the employees and the Union; and

(g) Reasonable career paths and job satisfaction embracing modern and flexible forms of work organisation, consistent with optimum use of all the Company’s resources.

3.3 Implicit is the ability for the Company and its employees to improve on any aspect of the operation.

3.4 The changes required in the workplace to bring about more constructive and collective work place relationships between management and employees.

3.5 Providing the Company with certainty of proficiency, reliability and continuity of operations in order to aid the further development and progress of the Company as the industry market leader in the interests of its shareholders and employees.

1. All the provisions of the enterprise agreement should be construed against the intent of the parties as expressed here. That is not a qualification or second stage to giving meaning to the words of particular provisions first looked at in isolation, but a recognition that one reads the words of any provision by reference to the agreed intent and purpose of the whole agreement.
2. When one considers the clear and common-sense purposes and aims of the chapeau to cl 3.2, of cl 3.2(g) and of cl 3.5, one is immediately struck by the contrariety to such purposes and aims of a construction of cl 8.4 as contended for by the respondent. Assuming, as was the case here, an employee was amply qualified and skilled to undertake a higher level of work at the Grade 5 level, it would leave to personal choice, convenience and caprice of the employee whether or not to accede to a request to perform work as a supervisor or foreman when, in the absence of such accession, there may be no one else available to fill the position. This could prevent the loading, unloading and timely departure of a large and costly commercial vessel. How would a complete absence of authority in the Company and an entirely personal and arbitrary choice of accession by employees to a request by the Company to require someone to work (for extra agreed pay) in a position for which he or she was skilled and competent to undertake, assist in promoting trust and co-operation between Company representatives and employees? How would it reflect a modern and flexible form of work organisation, consistent with the optimum use of all the Company’s resources? How would it provide the Company with certainty of proficiency, reliability and continuity of operations?
3. If the words of cl 8.4 were intractably precise and clear to lead to such a result, then the language of the provision might well prevail, even if it appeared contrary to the intent of the agreement expressed in cl 3. But the language of cl 8.4 can easily accommodate, in its plain text, the authority of the Company to require the so-called upgrade. The views of Jessup J and Bromberg J differ as to which parts of cl 8.4 lead to the conclusion as to the authority in the Company to require the upgrade. I agree with Jessup J as to what he has written about the first sentence. I would add that I would read the second sentence, in particular in the context, and under the influence of cl 3, as providing for a right in the company to direct an employee to perform work for which he or she is appropriately skilled. The introductory words of the second sentence make it plain that, at least as a matter of precaution, the provision is to be understood as providing for the width of authority there expressed. The source of the authority lies, in my view, in both parts of cl 8.4

### The second ground of appeal – whether the respondent had a workplace right

1. This ground assumes the correctness of the primary judge’s construction of cl 8.4. If the Company had no right to require the upgrade (because of a lack of authority sourced in the enterprise agreement) does that necessarily mean, as the reflex of that, that the employee had the workplace right **under the *Fair Work Act 1995* (Cth)** to refuse the direction?
2. All I wish to say is that I would not necessarily see as the logical or legal consequence of a lack of authority in the enterprise agreement in the employer to require an employee to do something that there is a right derived from the *Fair Work Act* to resist that requirement. For the employer to require such an action of the employee and to dismiss the employee on refusal to do it may well be wrongful termination; *non constat* that the employer’s lack of authority leads to a workplace right under the *Fair Work Act*.
3. The orders that I would make are:
4. Appeal allowed.
5. Set aside declaration in paragraph 1 of the orders of the Court made on 16 March 2016 and in lieu thereof order that the application be dismissed.

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| I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 9 September 2016

REASONS FOR JUDGMENT

JESSUP J:

1. This is an appeal from a declaration made by a Judge of the court on 16 March 2016 in a proceeding in which the respondent, Torren McMaster, alleged that the appellant, Qube Ports Pty Ltd, had taken adverse action against him in contravention of s 340 of the *Fair Work Act 2009* (Cth) (“the FW Act”). By the declaration, his Honour upheld that allegation. Because the substantive relief to which the respondent was entitled remained to be determined, the declaration was interlocutory, and leave to appeal was required. That leave was given by the primary Judge at the time he made the declaration.
2. From late 2007, the respondent was employed by the appellant at Station Pier as part of a team which moored, loaded and unloaded the Spirit of Tasmania vessels. His employment was covered by enterprise agreements made and approved under Pt 2-4 of the FW Act including, at the times which were relevant, the *Qube Ports Pty Ltd (TT Line VIC & TAS) & Maritime Union of Australia Enterprise Agreement 2012* (“the enterprise agreement”). By cl 5.2 of the enterprise agreement, the terms of the *Stevedoring Industry Award 2010* (“the award”), a modern award made under Pt 2-3 of the FW Act, were incorporated, with the rider that the terms of the enterprise agreement would prevail in the event of inconsistency.
3. It was provided in cl 13.1 of the award that an adult employee would be “paid a minimum weekly rate for their classification as set out in the table below”. In the table, seven grades, numbered 1-7, were set out, as were the minimum weekly rates which correspondingly related to those grades. The grades were, apparently, the “classifications” referred to, as cl 13.3 provided that the “classification structures and descriptors” were as contained in Schedule B to the award.
4. Schedule B made provision for Grades 3 and 5 as follows:

**Grade 3**

A Grade 3 employee is an employee who has attained the level of stevedoring employee Grade 2 and who has:

(a) completed additional training and has demonstrated competence in clerical and/or operational skills at this grade, and performs such functions as required by the employer from time to time in relation to:

(i) operation of heavy mechanical equipment such as heavy fork-lifts, straddle carriers, transtainers, front-end loaders, excavators or fuel trucks;

(ii) the operation of ships gear;

(iii) basic servicing of equipment incidental to the performance of functions at this grade;

(iv) clerical tasks incidental to the performance of functions at this grade;

(v) semi-skilled maintenance such as equipment and vehicle servicing and the use of hand tools in relation thereto, and incidental tasks;

(vi) general and routine clerical duties requiring the exercise of limited initiative, performed under supervision involving functions such as the processing of information or documents associated with the receival and delivery of cargo/containers; the loading and discharge of ships, the location of cargo in sheds or the wharf; the sorting and stacking of cargo/containers; time keeping;

(vii) security/watching duties where this is required to be carried out as a primary function of an employee;

(viii) first aid duties where this is required to be carried out as primary function of an employee;

(ix) where appropriate in respect to paragraphs (ii), (iii), (iv), (v) or (vi), functions associated with a higher grade as part of a training program;

(b) been trained and selected for appointment to the classification of stevedoring employee Grade 3 in accordance with the operational requirements of the employer’s enterprise.

…

**Grade 5**

A Grade 5 employee is an employee who has attained the level of stevedoring employee Grade 3 or 4 and who has:

(a) completed additional training and has demonstrated competence in the skills required at this grade and performs such functions as are required by the employer from time to time; and

(i) is the, or one of the key operational employees engaged on a shift and is experienced in the operation of equipment, assists and co-ordinates the work of others; works from a work plan or sequence, liaises with supervisory employees, and performs operations and incidental clerical tasks as required; or

(ii) in the case of an employee who works primarily in clerical functions, assists, co-ordinates or directs the work of other clerical employees, monitors the work flow in the area of responsibility, liaises with supervisory employees; performs clerical functions as required;

(iii) in relation to paragraphs (i) of (ii) where appropriate, performs functions associated with a higher grade as part of a training program;

(b) having been trained and selected for appointment to the classification of stevedoring employee Grade 5 in accordance with the operational requirements of the employer’s enterprise.

1. The relevance of these grades to the work of stevedores at Station Pier was explained by the primary Judge as follows:

The work of stevedores employed by Qube at Station Pier involved the loading onto and the unloading from the Spirit of Tasmania of freight, semi-trailers, excavators, other heavy machinery, and passenger cars. The stevedores usually worked in a gang of 10 made up of one G6, two G5s, five G3s, and two preparation workers. The G5 fulfilled a foreman role and directed the G3s in their work. The G3s drove the tow vehicles called bolnas which link to trailers for the purpose of towing them on and off the ship. The G3s also directed traffic and helped out the G5s. The eight stevedore gang members apart from the preparation members worked split shifts from 5.30 am to 8.30 am and from 3.30 pm until 7.30 pm. There were two gangs. Each gang worked a four day shift and then had four days off.

1. The respondent’s position, to which he had been promoted in 2011, was classified at Grade 3. He remained in that position at the time of the events which became controversial in the present litigation. Those events centred on the respondent’s refusal, on 7 June 2013, to comply with the appellant’s direction that he “upgrade” to a position which was classified at Grade 5. The first of five issues which arise on appeal is whether the respondent was, as the primary Judge held, legally entitled to refuse to comply with the direction.
2. The resolution of that issue depended, and depends, on the proper construction of cl 8.4 of the enterprise agreement, which was one of a series of provisions included under the heading, “Contract of Employment”. Clause 8.4 provided as follows:

Subject to the provisions of this Agreement, all employees are employed on the basis that each employee will carry out all work within their recognised and required competency as reasonably directed by the Company. Nothing in this Agreement shall prevent the Company from directing an employee to perform any work for which they are appropriately skilled.

I shall return to that constructional question presently.

1. The respondent’s refusal to comply with the direction to upgrade resulted in the appellant writing a letter to him late on 7 June 2013, in which it was said that the refusal was “a serious breach of your employment obligations”. His employment was terminated, but a week later, after discussions involving the appellant and the relevant trade union, that termination was converted into a suspension on pay, to allow time for the appellant to undertake a full consideration of the circumstances leading to the termination, and to the contemporaneous termination of the employments of three of the respondent’s co-workers. In the result, on 3 July 2013 the appellant sent what was described as a “show cause” letter to the respondent. That led to further correspondence which culminated in a letter from the appellant to the respondent on 23 July 2013, by which the appellant upheld its decision of 7 June 2013 to terminate the respondent’s employment.
2. The termination of the respondent’s employment was adverse action taken against him within the meaning of Pt 3-1 of the FW Act. He alleged that it was unlawful under s 340(1), which provides as follows:

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Relevantly to the matters which arise on appeal, the respondent contended that, in refusing the direction to upgrade on 7 June 2013, he was exercising a “workplace right” within the meaning of s 341(1)(a) of the FW Act, which provides as follows:

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; …

On the respondent’s case, the workplace right which he exercised was his entitlement to the benefit of the enterprise agreement and the award.

1. The matters which were controversial before the primary Judge ranged much wider than those summarised above, but, because of the way his Honour disposed of much of the respondent’s then case, what I have said will provide a sufficient background for an understanding of the questions which arise on appeal.
2. Dealing with so much of the respondent’s case as remains relevant, the primary Judge commenced by considering whether he had a right to refuse to upgrade under the enterprise agreement and the award. Since the respondent’s position was classified at Grade 3, his Honour looked to the elements of that classification set out in Schedule B to the award. In respect of item B.3(a)(ix), his Honour observed:

Thus, under the award, a G3 could be required to perform functions associated with a higher grade in circumstances limited by two conditions, namely, that the functions fell within the specified clauses, and where they are performed as part of a training program.

1. His Honour later observed: “The [classification] structure … provided for a G3 to perform at a higher grade, but in limited circumstances.” His Honour continued:

The Enterprise Agreement, by cl 8.4, in effect, adopted the classification structure as the definition of the boundaries of the duties applicable to the employment of an employee appointed to a particular grade. The reference in cl 8.4 to competency is a direct reference to the classification structure which uses the same terminology. The first sentence obliges the employee of a particular grade to perform all the functions of that grade stipulated in the classification structure. The second sentence in some degree is repetitive. The words “appropriately skilled” are another way of saying that the employee has the competencies required by the grade as specified in the classification structure. It is not an unusual drafting technique to repeat the same or similar concepts for the purpose of emphasis. To construe cl 8.4 as counsel for Qube suggests would render almost superfluous the classification structure despite the obvious reference to that structure particularly in the phrase “required competency”.

1. Accordingly, so his Honour held, the appellant had no legal right under the award or the enterprise agreement to require the respondent to upgrade; and, “as an inevitable consequence”, the respondent was entitled to refuse to upgrade.
2. The next matter considered by the primary Judge was whether the respondent had exercised that right, or entitlement, on 7 June 2013. It had been put to his Honour by the appellant that, to have the protection of s 340(1)(a)(ii) of the FW Act, an employee had to know of the relevant right and intend to rely on it. His Honour rejected that submission at two levels. First, he rejected the legal proposition on which the submission was based, holding that an employee could exercise the right without knowledge of it. Secondly, his Honour inferred from the evidence that the respondent believed that he had the right to refuse to upgrade.
3. That led his Honour to the central, and typically the most problematic, issue for resolution under s 341 of the FW Act, namely, whether the appellant had terminated the respondent’s employment *because* he had exercised the right referred to. The decision-maker was Michael Sousa, a director of the appellant. In this department of the case, the appellant carried the onus of proof: FW Act, s 361. In seeking to discharge that onus, the appellant advanced a case which the primary Judge summarised as follows:

Then, counsel for Qube argued that if even Mr McMaster had a right to refuse to upgrade, he was not dismissed by Mr Sousa for the reasons that he exercised that right because Mr Sousa believed that Mr McMaster was obliged to upgrade and had no right to refuse. Even if Mr Sousa was mistaken about the law, his belief was critical to the reason for the dismissal for the purposes of s 340(1)(a)(ii) of the Act. Unless Mr Sousa appreciated that Mr McMaster was exercising a workplace right he could not be found to have acted for a prescribed reason.

1. This case gave rise, his Honour noted, to “an initial factual issue”, namely, whether Mr Sousa did believe that the appellant had the right to direct the respondent to upgrade. Referring to his evidence to that effect, his Honour said:

This evidence was as to his general understanding of the legal position concerning the power of an employer to direct an employee to upgrade. It was not evidence that he considered the question of the legality of his action on 23 July 2013. The evidence is silent on that issue. If an inference is to be drawn at all, then the inference would be that Mr Sousa did not consider or take into account the legality of [the respondent’s] action. On either of these views of the evidence, the factual basis for the submission is not made out.

1. Notwithstanding that finding, the primary Judge proceeded to deal with the case on the assumption that Mr Sousa did believe that the appellant had the right to direct the respondent to upgrade. On his Honour’s findings, that belief would have been “founded on a mistaken view of the law”. There followed a detailed consideration of the law as established in the High Court judgments in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243, and as applied in the Full Court judgments in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 and *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273; and of the earlier first-instance judgment of the court in *Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156.
2. His Honour continued:

Whilst the authority of *Barclay*, *BHP Coal* and *Endeavour Coal* must govern the circumstances to which they were addressed, they were not concerned with the present situation in which an employer dismissed an employee because the employer made a mistake of law in concluding that the employee did not have a workplace right.

In relation to matters of fact, the authorities have established that the mental process of the decision maker determines whether the action taken was “because” the employee exercised a workplace right. The consequence of that reasoning has the possibly unintended result in cases such as *Anglo* where the decision maker misunderstands the facts. The decision maker avoids liability even though on the facts as they were the victim was subjected to adverse action by the decision maker. The result is to restrict the area of protection of the victim provided by the section and to expand the area of non-culpability of the decision maker. The purpose of the section is to provide protection to the victims of adverse action. In order to do so it is necessary to limit the scope of the doctrine so far developed to mistakes of fact made by decision makers. The beneficial purpose of the section would be impeded if decision makers who mistake the law avoid liability.

His Honour supported the distinction he made between mistakes of fact and mistakes of law by reference to the truism that “people are presumed to know the law”. His Honour continued:

Members of society are not able to claim ignorance of the law as an excuse for action which is contrary to law. To allow people to do so would undermine the foundation on which an ordered society rests. It is unlikely that ignorance of the legal right was intended by the section to render the perpetrator immune from liability for the adverse action.

1. In the result, the primary Judge held that, even if Mr Sousa believed that the appellant had the right to direct the respondent to upgrade, that belief was of no avail to him under s 340 of the FW Act. The appellant had, in the circumstances, failed to discharge the onus of proving that it had not dismissed the respondent because of his exercise of the workplace right which *he* had, namely, the right to refuse to comply with such a direction.
2. The appellant has five grounds of appeal.
3. The appellant’s first ground of appeal is that the primary Judge was in error in holding that, on the proper construction of cl 8.4 of the enterprise agreement, the appellant could not legally require or direct the respondent to upgrade to the Grade 5 stevedore position. It will be recalled that the basis of this holding was that an employee’s “recognised and required competency” was a reference to the functions listed in his or her classification grade as set out in Schedule B to the award – in the respondent’s case, Grade 3 – and that the only respect in which an employee might be directed to perform functions at a higher grade was where those functions were “associated with a higher grade as part of a training program”.
4. With respect, I cannot accept the primary Judge’s construction of cl 8.4 of the enterprise agreement in this respect. Commencing with item B.3(a)(ix) in Schedule B to the award, when a Grade 3 employee performed Grade 5 functions as part of a training program, the effect of this provision was that he or she was still operating within the Grade 3 classification definition. That item was not, in my view, relevant to a situation in which a qualified employee, in need of no further training, was upgraded to perform the substantive duties of a Grade 5 position on a temporary basis.
5. Turning to the terminology of cl 8.4 of the enterprise agreement as such, I would not regard the passage “within their recognised and required competency” as operating to limit the “work” that the employee might be directed to perform to that which fell within the classification definition of the ongoing position which he or she occupied. It is true, as the primary Judge pointed out, that item B.3(a) in Schedule B to the award used the expression “demonstrated competence”, but so did item B.5(a). As a matter of construction, I regard the contentious words in cl 8.4 of the enterprise agreement as referring to any work which the employee in question was in fact competent to perform according to what was recognised and required by the appellant. In the case of the respondent, he had the “recognised and required competency” to perform functions at the Grade 5 level and, apparently, had done so many times previously.
6. I have reached this conclusion by reference to the wording of cl 8.4 of the enterprise agreement, read naturally in a context which includes the remuneration provisions of the award. There are, moreover, two more general, higher-level, considerations which, in my respectful view, make the construction preferred by the primary Judge one which is unlikely to have been intended. The first arises from certain provisions in cl 3 of the enterprise agreement, headed, “Intent of this Agreement”. It is there provided as follows:

3.2 The parties recognise that it is essential to achieve a spirit of trust and co-operation between employer representatives and employees, as required within the overall objectives of the Company through the provision of:-

(a) A safe work place;

(b) Job security;

(c) A constructive and co-operative employer and employee relationship;

(d) Competitive remuneration;

(e) A non-discriminatory approach;

(f) Regular and genuine communication with the employees and the Union; and

(g) Reasonable career paths and job satisfaction embracing modern and flexible forms of wok organisation, consistent with optimum use of all the Company’s resources.

…

3.5 Providing the Company with certainty of proficiency, reliability and continuity of operations in order to aid the further development and progress of the Company as the industry market leader in the interests of its shareholders and employees.

1. Those involved in making, and approving, the enterprise agreement clearly intended it to be a vehicle for the achievement of “modern and flexible forms of work organisation, consistent with optimum use of all the Company’s resources”, and of “reliability and continuity of operation”. On the construction of cl 8.4 favoured by the primary Judge, a single Grade 3 employee might, for any reason which attracted itself to him or her, or for no reason, refuse to carry out the Grade 5 duties for which he or she was qualified. Given that these duties involved the supervision of labour, the sense in which achievement of the “intent of the agreement” would thereby be frustrated is readily apparent.
2. The second consideration is prompted by the following passage in the reasons of the primary Judge:

[I]t emerged from the evidence that the practice of upgrading is common across waterfront employment in Australia. That, of course, may be accepted without concluding that employees are required to upgrade. So long as there is cooperation in the workplace employees may be quite willing to upgrade. For one thing an additional allowance is payable for doing so. But, a practice of voluntary upgrading does not establish a legal right of employers to require employees to do so.

I agree with the final sentence in this extract, but the common practice to which his Honour referred is unlikely, with respect, to have reflected the widespread dispensation of favours by employees to their employers, even if, as his Honour considered relevant, the former received an additional allowance in this regard. After all, it is on the lawful direction of employers that employees conventionally work, and, if there were a common practice of the kind referred to, the assumption must be, in my view, that it resulted from directions given by the employers in question. On its own, this consideration, of course, would go nowhere in the construction of cl 8.4, but it provides some illumination of the industrial relations background in the setting of which the clause falls to be construed. The construction which I favour would not be discordant with that background.

1. To date, I have construed the first sentence in cl 8.4 of the enterprise agreement without reference to the second. Both at first instance and on appeal, the appellant relied also on the second sentence in its contention that it was, under the agreement, entitled to direct the respondent to upgrade. As appears from what I have set out above, the primary Judge took the view that the second sentence effectively reiterated what had been said in the first, and introduced no such entitlement. With respect, I do not consider that the role of the second sentence may be dismissed in this way. The present case, with its very specific facts, does not constitute an appropriate vehicle for a consideration of how the sentence operates across the many potential situations that are implied by the expression “nothing in this agreement”. But I would hold that it has at least this operation: if there were some work for which an employee was appropriately skilled, whether within or without the range of his or her normal duties, nothing in the enterprise agreement would prevent the appellant from directing him or her to perform that work. In the context of the present case, it was not necessary for the appellant to rely on the second sentence since, in the view I take, the first sentence did not prevent the appellant from giving any such direction.
2. I would uphold the appellant’s first ground of appeal.
3. The appellant’s second, third and fifth grounds of appeal were advanced in the alternative to the first. Since I would uphold the first, and subject to what follows in the next three paragraphs below, I would not find it necessary to consider the second, third and fifth.
4. Under its fifth ground, the appellant contended that the primary Judge had erred in finding that Mr Sousa had decided that the respondent’s employment should be terminated because he exercised the workplace right constituted by his entitlement to the benefit of the enterprise agreement. If it were the case that the respondent’s refusal to upgrade had been a reason (see the FW Act, s 360) why Mr Sousa decided that his employment should be terminated, and if (contrary to the appellant’s case) the respondent had been entitled under the enterprise agreement so to refuse, that did not, in the submission of the appellant, mean that Mr Sousa had made that decision because of that entitlement. On the facts, it was submitted, such an entitlement was no part of Mr Sousa’s thinking at the time. Here the appellant challenged the correctness of his Honour’s analysis of the law established by the *Barclay* line of authorities, and of what his Honour said about *Musgrove* (see para 27 above).
5. The application of this area of the law is necessarily very fact-specific, and it would not, in my view, be appropriate to add, by way of *obiter* only, to what has been said in previous cases which did directly raise for consideration issues of the kind which the appellant would seek to ventilate. In particular, it would not, in my view, be appropriate for the court to embark upon a consideration of the relationship between a workplace right possessed by the respondent and Mr Sousa’s reasons for dismissing him in circumstances where I would hold that the respondent possessed no such right.
6. However, and for no reason other than to avoid misunderstanding, I would add that my decision to stay out of the area of controversy raised by the appellant’s fifth ground should not be interpreted as an endorsement of the primary Judge’s reasons in relevant respects. In particular, I would not, with respect, associate myself with the distinction which his Honour made, categorically, between an error of fact and an error of law on the part of the relevant decision-maker. Neither, with respect, was his Honour correct to say that people are presumed to know the law. As Gleeson CJ and Kirby J said in *Ostrowski v Palmer* (2004) 218 CLR 493, 500 [1]:

Professor Glanville Williams said that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse when a person is charged with an offence [Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 451]. This does not mean that people are presumed to know the law. Such a presumption would be absurd. Rather, it means that, if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence.

And so it is with civil contraventions of the provisions of Pt 3-1 of the FW Act. But it would, in my view, be an unwarranted extension of the principles laid down in existing authority to impute to a decision-maker a reason for acting which did not in fact exist by reason of a presumption that he or she knew the law.

1. That leaves the appellant’s fourth ground of appeal. It is here contended that the primary Judge erred by characterising Mr Sousa’s operative reason for dismissing the respondent as a refusal to upgrade, where the evidence showed that Mr Sousa’s operative reason was the repeated failure to follow management directions and where Mr Sousa believed that the respondent refused those directions solely as a response to the earlier dismissal of a co‑worker, Mr Lunt. Although, technically, this ground too becomes moot if, as I would propose, the first ground is upheld, it was not expressed as being in the alternative and proposes a very different finding as to Mr Sousa’s reasons than that upon which each of the other grounds is premised.
2. If in other respects his case had been made out, it would, of course, have been sufficient for the respondent if Mr Sousa had dismissed him for reasons which included his refusal to comply with the direction to upgrade on 7 June 2013: see s 360 of the FW Act. And it is clear from the following passage of the cross-examination of Mr Sousa in the proceeding before the primary Judge that this was indeed the case:

And you've cast the decision - one of the reasons for your decision in various ways, sir, but is it fair for his Honour to understand that you say that one of the reasons was that he had failed to follow what you regarded as a direction - a lawful and reasonable direction from a manager to upgrade?---Yes.

Well, that perhaps had two parts. It was a failure to follow a lawful and reasonable direction; that was one of the reasons you terminated his employment?---Yes.

But the particular lawful and reasonable direction at issue was the direction to upgrade from a G3 duty to a G5?---Yes.

That was what this was about, as you saw it?---Yes. This was about refusing the manager's instruction for him to upgrade.

The submission made on appeal that the reasons which moved Mr Sousa to terminate the respondent’s employment did not include the circumstance that he had refused to upgrade was, in my view, untenable in the light of this evidence.

1. I would reject the appellant’s fourth ground of appeal.
2. Because I would uphold the appellant’s first ground of appeal, and hold that the respondent did not have, and therefore did not exercise, a workplace right, I would uphold the appeal generally and substitute for the orders made by the primary Judge an order that the application be dismissed.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup. |

Associate:

Dated: 9 September 2016

REASONS FOR JUDGMENT

BROMBERG J:

1. The appellant (**“Qube Ports**”) employed the respondent (“**McMaster**”) in the position of Stevedore Grade 3. McMaster refused a direction from Qube Ports to upgrade to the position of Stevedore Grade 5 for the shift worked by him on 7 June 2013. On 23 July 2013, Qube Ports dismissed McMaster from his employment. Before the primary judge, McMaster contended that the dismissal contravened s 340(1)(a) of the *Fair Work Act 2009* (Cth) (“**the FW Act**”). He submitted that in refusing to upgrade he had exercised a workplace right and, by reason of the exercise of that right, Qube Ports dismissed him from his employment.
2. The primary judge held that Qube Ports had no legal right under the applicable enterprise agreement to require McMaster to upgrade. It followed, so the primary judge reasoned, that McMaster was entitled to refuse to be upgraded. That right was held to be a workplace right within the meaning of s 341 of the FW Act and its exercise was found to be a basis for Qube Port’s contravention of s 340(1)(a)(ii) of that Act.
3. If the primary judge erred in construing the applicable enterprise agreement as not entitling Qube Ports to require McMaster to upgrade, it would follow that McMaster did not have or exercise a workplace right to refuse to be upgraded, and that the primary judge erred in finding that Qube Ports had contravened s 340(1)(a)(ii). For that reason, the principal issue raised by this appeal is whether Qube Ports was entitled to require McMaster to upgrade and perform the functions of a Stevedore Grade 5. That issue turns on the proper construction of cl 8.4 (“**cl 8.4**”) of the *Qube Ports Pty Limited (TT Line VIC & TAS) & Maritime Union of Australia Enterprise Agreement 2012* (“**Enterprise Agreement**”).
4. I respectfully differ from the construction of cl 8.4 adopted by the primary judge. In my view, the terms of cl 8.4, and in particular the second sentence thereof, provided Qube Ports with the capacity to require McMaster to upgrade and perform the functions of a Stevedore Grade 5 on a temporary basis.
5. Clause 8.4 provides:

Subject to the provisions of this Agreement, all employees are employed on the basis that each employee will carry out all work within their recognised and required competency as reasonably directed by the Company. Nothing in this Agreement shall prevent the Company from directing an employee to perform any work for which they are appropriately skilled.

1. Having noted that cl 5.2 of the Enterprise Agreement incorporated the terms of the *Stevedoring Industry Award 2010* (“**the Award**”) and, in particular, the classification structure which describes each of the stevedoring grades, the primary judge at [185] construed cl 8.4 as follows:

The Enterprise Agreement, by cl 8.4, in effect, adopted the classification structure as the definition of the boundaries of the duties applicable to the employment of an employee appointed to a particular grade. The reference in cl 8.4 to competency is a direct reference to the classification structure which uses the same terminology. The first sentence obliges the employee of a particular grade to perform all the functions of that grade stipulated in the classification structure. The second sentence in some degree is repetitive. The words “appropriately skilled” are another way of saying that the employee has the competencies required by the grade as specified in the classification structure. It is not an unusual drafting technique to repeat the same or similar concepts for the purpose of emphasis. To construe cl 8.4 as counsel for Qube suggests would render almost superfluous the classification structure despite the obvious reference to that structure particularly in the phrase “required competency”.

1. I commence the constructional exercise with two observations. *First*, unless there was good reason, I would construe the second sentence of cl 8.4 as intended to do more than simply repeat, in different language, the requirements of the first sentence. Prima facie, each of the two sentences should be regarded as having been intended to have some work to do. *Second*, the language utilized in each of the first and second sentences reveals a distinction in the subject matter dealt with by each sentence. I think that distinction is significant. Each sentence deals with work that may be required of an employee. They do so by reference to the skills of the employee. However, whilst the second sentence conditions the requirement to perform work by reference to the skills held by the employee, the condition placed on the requirement made by the first sentence is upon the recognised and required skill of the employee, described as “their recognised and required competency”.
2. The inclusion of “recognised and required” in the first sentence, raises the question as to whose recognition and requirement the clause is referring to. I doubt that the sentence has in mind the employer. *First,* the inclusion of the word “recognised” would be odd if all that the first sentence was trying to say was that the employer is entitled to direct an employee to perform any work which the employee has the skill to perform. *Second*, that is precisely what the second sentence already does. *Third*, if “recognised” meant recognised by the employer, the subjective assessment of the employer as to the skills held by the employee would dictate the extent of the work that may be required. It seems to me unlikely that it was intended to provide the employer with a unilateral power of that kind but, additionally, such a capacity would be inconsistent with the operation of the second sentence where what may be required by the employer is conditioned by the objective criterion of “appropriately skilled”.
3. In the context of the Enterprise Agreement itself providing a process for the recognition of competency, it is more likely that what the first sentence intends is that the employer may reasonably direct an employee to carry out work within the employee’s competency which the processes provided by the Enterprise Agreement recognise and require.
4. The Enterprise Agreement incorporates and applies the classification structure in the Award. That classification structure is what is commonly called a “competency-based” or “skilled‑based” classification structure. Skilled based, as opposed to craft based, classification structures became common in awards and industrial agreements in Australia as a result of the award restructuring exercise required by the “Structural Efficiency Principle” established by the National Wage Cases conducted by the Australian Industrial Relations Commission in 1989: see *National Wage Case February 1989 Review* (1989) 27 IR 196; *National Wage Case August 1989* (1989) 30 IR 81 and JJ Macken, *Award Restructuring* (The Federation Press, 1989) particularly at chapters 6–8.
5. Skill recognition is an essential element of a competency-based classification structure in which employees progress from one grade to the next following the acquisition and recognition of new skills or competencies. The classification structure in the award provides for the recognition of competency. It provides for employees to progress between grades having “completed additional training and [having] demonstrated competence in the skills required at this grade”. When cl 8.4 speaks of the “recognised … competency” of the employee, it is referring to the competency which the employee has “demonstrated” and been accredited for in order to be classified at a particular grade in the classification structure. The reference to “required” is a reference to the skills and functions required of an employee at the particular grade. Consistently with the conclusion reached by the primary judge at [185], I would construe the first sentence as obliging an employee classified at a particular grade to provide the skills and to perform the functions required by that grade.
6. Contrary to the conclusion reached by the primary judge, the qualification made by the second sentence of cl 8.4 is, in my view, directed to making it clear that the work that may be required of an employee is not confined to the performance of the functions specified by the employee’s designated grade. Although cast as a qualification, the second sentence empowers the employer to require the utilisation of all of the skills held by the employee, whether or not the skills have been recognised for classification purposes.
7. That construction is consistent with the language utilised by cl 8.4 understood by reference to the context in which that language was employed. It also provides for a coherent provision in which each sentence thereof is sensibly given work to do.
8. With respect to the primary judge, a construction of cl 8.4 which would require a Grade 3 employee to perform the work of a Grade 5 would not render the classification structure “almost superfluous”. Where a full-time salaried employee is engaged in work of a higher grade than that of a Grade 3, cl 9.1.1(d) of the Enterprise Agreement requires the employee to be paid at the rate for the higher grade. Additionally, employees who are upgraded are entitled to an allowance provided by cl 2.5.1 of Part B of the Enterprise Agreement. Furthermore, cl 9.1.1(e) is directed at maintaining the integrity of the classification structure by requiring the reclassification of a full-time salaried employee where, in a 12 month period, the employee “works in excess of 70 % of hours at a higher grade”.
9. Each of those provisions is consistent with the entitlement given to Qube Ports to require employees to work to the full capacity of the skills which they hold. There is nothing in the terms of cl B.3(a)(ix) of the Award (referred to by the primary judge at [179]) in support of a contrary construction. That provision seeks to do no more than to identify that where functions associated with a higher grade are performed as part of a training program, the performance of that work is to be regarded as work performed within the Grade 3 classification.
10. For those reasons I would uphold the appellant’s first ground of appeal.
11. As the appellant’s success on the first ground of the appeal determines the appeal, it is not necessary to consider the appellant’s other grounds of appeal. I will, however, make one observation about the fifth ground of appeal which raised the proper application of the principles enunciated in *Board of Bendigo Regional Institute of Technological and Further Education v Barclay* (2012) 248 CLR 500.
12. There is force in McMaster’s submission that, where a person is motivated to take adverse action by facts in the mind of that person that answer the description of a workplace right, the person is not exculpated from liability under s 340 because he or she did not know that those motivational facts could be characterised under the FW Act as constituting a workplace right. It is in that sense that it may be said, as I think the primary judge did say at [236]–[238], that to mistake the law or be ignorant as to the law, is not exculpatory.
13. Having, to that extent, failed to resist the temptation to enter upon that field, I think it appropriate that I say no more. To date, three Full Courts that have applied the principles of *Barclay* have split (*BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245; *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150; *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273); as, of course, did the High Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243. In that context, the *obiter* observations of this Full Court are unlikely to be of much assistance.
14. I would allow the appeal, set aside the declaration made by the primary judge on 16 March 2016 and make an order that the Second Further Amended Application dated 13 July 2015 be dismissed. No order as to costs was sought and no such order ought be made.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 9 September 2016