FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Hu (No 2) [2019] FCAFC 175

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| Appeal from: | *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034 |
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| File number: | QUD 530 of 2018 |
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| Judges: | **FLICK, REEVES AND BROMBERG JJ** |
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| Date of judgment: | 16 October 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – s 570(2) of the *Fair Work Act 2009* (Cth) – application for costs – conduct of appellant was not unreasonable such as to cause costs to be incurred – appeal was not such as to be instituted without reasonable cause – application refused |
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| Legislation: | *Fair Work Act* *2009* (Cth) ss 45, 570  *Horticulture Award 2010* cl 15.2 |
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| Cases cited: | *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229, (2009) 236 FLR 1  *Fair Work Ombudsman v Hu* *(No 2)* [2018] FCA 1034  *Fair Work Ombudsman v Hu* [2019] FCAFC 133  *Shea v EnergyAustralia Services Pty Ltd (No 2)* [2015] FCAFC 14 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 28 August 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 12 |
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| Counsel for the Appellant: | Mr J Bourke QC with Mr A J Coulthard |
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| Solicitor for the Appellant: | Fair Work Ombudsman |
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| Counsel for the First Respondent: | The First Respondent did not appear |
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| Counsel for the Second and Third Respondents: | Mr P Tucker with Mr D King |
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| Solicitor for the Second and Third Respondents: | Hopgood Ganim Lawyers |
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| Counsel for the Intervener: | Mr R Dalton SC with Mr A Denton |
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| Solicitor for the Intervener: | Seyfarth Shaw Australia |

ORDERS

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|  | | QUD 530 of 2018 |
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| BETWEEN: | FAIR WORK OMBUDSMAN  Appellant | |
| AND: | TAO HU  First Respondent  MARLAND MUSHROOMS QLD PTY LTD  Second Respondent  TROY MARLAND  Third Respondent | |
|  | NATIONAL FARMERS’ FEDERATION LIMITED  Intervener | |

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| JUDGES: | FLICK, REEVES AND BROMBERG JJ |
| DATE OF ORDER: | 16 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The Second and Third Respondents’ application for an order for costs pursuant to s 570(2) of the *Fair Work Act 2009* (Cth) be refused.

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

REASONS FOR JUDGMENT

THE COURT:

1. In the present proceeding the Fair Work Ombudsman commenced a proceeding claiming contraventions of s 45 of the *Fair Work Act* *2009* (Cth) (the “*Fair Work Act*”) and that the Respondents were knowingly involved in those contraventions. In very summary form, it was claimed that persons who had been employed to pick mushrooms at the Marland farm had entered into a piecework agreement and had not been paid their entitlements pursuant to cl 15.2 of the *Horticulture Award 2010* (the “*Horticulture Award*”).
2. The proceeding ultimately proceeded to hearing against two of the Respondents, namely Marland Mushrooms Qld Pty Ltd (“Marland Mushrooms”) and its sole director and shareholder, Mr Troy Marland. The National Farmers’ Federation was granted leave to intervene in the proceeding.
3. The primary Judge dismissed the proceeding: *Fair Work Ombudsman v Hu* *(No 2)* [2018] FCA 1034. The Fair Work Ombudsman appealed. The appeal was dismissed: *Fair Work Ombudsman v Hu* [2019] FCAFC 133.
4. Marland Mushrooms and Mr Marland now seek an order for the payment of their costs of the appeal. Section 570 of the *Fair Work Act* provides for the making of such an order if, relevantly for present purposes, the appeal was either:

* “*instituted … without reasonable cause*” (s 570(2)(a)); or
* conducted in a manner which was “*unreasonable*” so as to “*[cause] the other party to incur … costs…*” (s 570(2)(b)).

1. Section 570 of the *Fair Work Act* provides as follows:

**Costs only if proceedings instituted vexatiously etc.**

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

(note omitted)

1. Although the submissions as filed by Marland Mushrooms and Mr Marland fail to clearly differentiate between the circumstances contemplated by s 570(2)(a) as opposed to s 570(2)(b), it is understood that they contend that the appeal was “*instituted … without reasonable cause*” because:

* one of the issues to be resolved was a question as to the proper construction of cl 15 of the *Horticultural Award* and whether any contravention only arose when a worker “*enter[ed] into an agreement for the employee to be paid a piecework rate*” – an issue in respect to which the joint reasons of Flick and Reeves JJ concluded that there was “*little difficulty … in accepting [the] conclusions of the primary Judge*”: [2019] FCAFC 133 at [20];
* the absence of any “*genuine prospect of disturbing the primary Judge’s finding that Mr Marland did not know that the HRS Country employees were casual employees*”; and
* the rejection in the joint reasons of the Fair Work Ombudsman’s argument “*that the principle in Jones v Dunkel had been applied too narrowly by the primary Judge*”.

1. The submission that the appeal had been “*instituted … without reasonable cause*” is rejected and the argument advanced in support of the application for an order for costs pursuant to s 570(2)(a) is rejected because:

* the issue of construction focussed upon was but one of a number of questions of construction which needed to be resolved; and
* one of the issues of construction, and a matter of fundamental importance to the entitlements of the casual workers and the administration of the *Fair Work Act*, was a question which divided the present Court.

Moreover:

* although a question of construction of an enterprise agreement or a provision of the *Fair Work Act* may ultimately be easily revolved once it is exposed to scrutiny, any such ease of resolution does not necessarily translate into a submission that the presentation on appeal to a Full Court of that question was “*vexatiously*” instituted or instituted without “*reasonable cause*”.

1. It is further understood that the submissions as filed by Marland Mushrooms and Mr Marland contend that the conduct of the appeal was “*unreasonable*” and thereby occasioned them to “*incur … costs*” within the meaning of s 570(2)(b) because:

* the *Notice of Appeal* relied upon by the Fair Work Ombudsman was characterised in the joint judgment as a “*somewhat discursive document which set forth 14 Grounds of Appeal*”: [2019] FCAFC 133 at [9]; and
* the arguments sought to be advanced on appeal were said in the joint judgment to “*[trespass] well beyond the case as pleaded and as advanced before the primary Judge*” [2019] FCAFC 133 at [8].

Underlying these submissions were said to be the more fundamental propositions that the Fair Work Ombudsman as a regulator:

* should not “*be permitted to deviate from its pleaded case*” (cf. *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [567], (2009) 236 FLR 1 at 125 per Austin J); and
* should “*scrupulously avoid arguments that were not advanced upon its pleading or at trial*” (cf. *Shea v EnergyAustralia Services Pty Ltd (No 2)* [2015] FCAFC 14 at [4] per Rares, Flick and Jagot JJ).

1. These arguments are rejected because:

* although there was a lack of precision on the part of the Fair Work Ombudsman in the identification of the issues to be resolved – both by the primary Judge and on appeal, it is sometimes the case that it is only an exchange between the Bench and Counsel which serves to isolate or clarify the precise questions in need of resolution. Considerable care needs to be exercised before moving from a state of satisfaction that a case may have been better presented into a conclusion that any resultant uncertainty or even confusion during the course of a hearing is to be translated into a finding that any such lack of precision constitutes an “*unreasonable act or omission*” for the purposes of s 570(2)(b).

There is, moreover, a further concern namely:

* the lack of precision in the identification of the issues to be resolved which “*caused [Marland Mushrooms and Mr Marland] to incur the costs*” the subject of the claim for the purposes of s 570(2)(b). Although the hearing on appeal potentially took longer than may have been required had the submissions of all parties to the appeal been more carefully prepared, no finding can be satisfactorily made that the appeal conducted in a different and more focussed manner would necessarily have taken less time.

1. Although it may be accepted, as submitted on behalf of Marland Mushrooms and Mr Marland, that “*a finding of accessorial liability is a serious matter, involving proof of intention*”, it is concluded that the facts do not support a conclusion that falls within s 570(2) of the *Fair Work Act*.
2. It necessarily follows that the application for an order for costs should be rejected.
3. There should be no variation to the order made on 16 August 2019, namely that the appeal be dismissed.

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| I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick, Reeves and Bromberg. |

Associate:

Dated: 16 October 2019