FEDERAL COURT OF AUSTRALIA

CSR Limited v CSR & Holcim Staff Association [2015] FCAFC 95

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| Citation: | CSR Limited v CSR & Holcim Staff Association [2015] FCAFC 95 |
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| Parties: | **CSR LIMITED (ACN 000 001 276) v CSR & HOLCIM STAFF ASSOCIATION and FAIR WORK COMMISSION** |
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| File number: | NSD 1374 of 2014 |
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| Judges: | **JESSUP, BROMBERG AND KATZMANN JJ** |
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| Date of judgment: | 1 July 2015 |
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| Catchwords: | **INDUSTRIAL LAW** — transitional instruments — modern enterprise awards — whether mandatory considerations in the modern enterprise awards objective taken into account when deciding whether or not to make a modern enterprise award |
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| Legislation: | *Fair Work Act 2009* (Cth) s 134  *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 6, Items 4 and 6  *Workplace Relations Act 1996* (Cth) |
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| Cases cited: | *Yum! Restaurants Australia Pty Ltd v Full Bench* *of Fair Work Australia* (2012) 205 FCR 306 |
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| Date of hearing: | 8 May 2015 |
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| Date of last submissions: | 15 May 2015 |
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| Place: |  |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 24 |
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| Counsel for the Applicant: | S Wood QC with B Jellis |
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| Solicitor for the Applicant: | FCB Workplace Law |
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| Counsel for the First Respondent: | S Crawshaw SC |
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| Solicitor for the First Respondent: | W G McNally Jones Staff |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice |
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| Solicitor for the Second Respondent: | Australian Government Solicitor |
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| *Amicus Curiae:* | I Neil SC |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | NSD 1374 of 2014 |

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| BETWEEN: | CSR LIMITED (ACN 000 001 276)  Applicant |
| AND: | CSR & HOLCIM STAFF ASSOCIATION  First Respondent  FAIR WORK COMMISSION  Second Respondent |

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| JUDGES: | JESSUP, BROMBERG AND KATZMANN JJ |
| DATE OF ORDER: | 1 JULY 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. A writ of certiorari issue directed to the second respondent quashing its decision made on 15 December 2014 not to make a modern enterprise award under item 4 of Sch 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

2. A writ of mandamus issue directed to the second respondent requiring it to determine the first respondent’s application under item 4 of Sch 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) according to law.

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

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| BETWEEN: | CSR LIMITED (ACN 000 001 276)  Applicant |
| AND: | CSR & HOLCIM STAFF ASSOCIATION  First Respondent  FAIR WORK COMMISSION  Second Respondent |

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| JUDGES: | JESSUP, BROMBERG AND KATZMANN JJ |
| DATE: | 1 JULY 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# The Court

1. In this proceeding, the applicant, CSR Limited (“CSR”), claims the issue of a writ of certiorari directed to the second respondent, the Fair Work Commission (“the Commission”) removing into the Court to be quashed a decision which it made on 15 December 2014 rejecting the application of the first respondent, CSR & Holcim Staff Association (“the Staff Association”), for the making of a modern enterprise award under item 4 of Sch 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (“the TP Act”). CSR also seeks the issue of a writ of mandamus requiring the Commission to hear and determine the Staff Association’s application under item 4 according to law.
2. The application to the Commission by the Staff Association had the support of CSR. Likewise, CSR’s present application in this Court has the support of the Staff Association. In the absence of a conventional contradictor, Mr Neil SC appeared at short notice as *amicus curiae*, and the submissions which he made have been of considerable assistance to the Court.
3. Under the *Workplace Relations Act 1996* (Cth), the terms and conditions of employment of CSR employees were covered by the CSR Staff (Consolidated) Award 2000 (“the 2000 Award”). The coverage clause of the 2000 Award was in the following terms:

This award shall be binding upon the Association and its members and those eligible for membership of the Association and on the employer in respect of the employment of an employee in the States of Queensland, New South Wales, Victoria, South Australia, Western Australia, Tasmania, the Australian Capital Territory, the Northern Territory or elsewhere, and shall come into operation from the first pay period commencing on or after 7 July 2000 and shall remain in force for a period of twelve months.

1. By the rules of the Staff Association, the following were eligible for membership:

The members of the Association shall be such salaried employees as have already signed or shall hereafter sign an application for membership in the form set out in the Schedule hereto and whose application shall have been accepted by the Executive Council. Provided that any application for membership by a salaried employee which the Executive Council shall refuse to accept shall be referred by the Executive Council to a General Meeting of the Association to be held within three months of the date of the Application and such General Meeting may accept such Application.

1. In its decision of 15 December 2014, the Commission explained the origins of the 2000 Award as follows:

22. The CSR Award 2000 has its origins in a consent award made in settlement of an industrial dispute in 1944, which has been varied almost invariably by consent between the Association or its predecessors and CSR or its predecessors ever since. The variations to the CSR Award 2000 since it was made have been predominantly to reflect Full Bench decisions of the AIRC of national application rather than decisions particular to CSR.

(Footnotes omitted).

1. As to CSR itself, the Commission said:

15. The “Employer” is defined in the CSR Award 2000 as “CSR Limited”. The origins of CSR date back to 1855 and a partnership formed to refine sugar. In 1887, The Colonial Sugar Refining Company Limited was established. That company diversified into building materials and construction from 1939. The company became CSR in 1973 and diversified into the natural gas and oil industries in the latter part of the 1970s and early 1980s. In 2003, CSR sold its interests in heavy building products, in 2007 CSR acquired glass businesses and in 2010 CSR sold its sugar and ethanol business.

16. CSR currently has four divisions:

* CSR Bradford which manufactures and markets glasswool, rockwool, foil insulation and ventilation products.
* CSR Bricks and Roofing which manufactures and markets bricks and roofing products.
* CSR Lightweight Systems which has four business units manufacturing plasterboard and related products, fibre cement sheeting, commercial ceilings, and autoclaved aerated concrete.
* Viridian which manufactures, processes and distributes glass products to the building and construction industry.

1. The Commission accepted that the 2000 Award was an “enterprise instrument” within the meaning of Part 2 of Sch 6 to the TP Act. For present purposes, it is sufficient to say that this circumstance, amongst others, made available “the enterprise instrument modernisation process” for which Div 2 of that part provided. That division contained items 4 and 6, by reference to which the present application must be determined.
2. Items 4 and 6 were in the following terms:

**4 The enterprise instrument modernisation process**

(1) The ***enterprise instrument modernisation process*** is the process of making modern awards under this Division to replace enterprise instruments.

(2) On application, the FWC may make a modern award (a ***modern enterprise award***) to replace an enterprise instrument.

(3) The application may be made only:

(a) by a person covered by the enterprise instrument; and

(b) during the period starting on the WR Act repeal day and ending at the end of 31 December 2013.

(4) A modern enterprise award must be made by a Full Bench.

(5) In deciding whether or not to make a modern enterprise award, and in determining the content of that award, the FWC must take into account the following:

(a) the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application;

(b) whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument, or whether such a modern award is likely to be made in the Part 10A award modernisation process;

(c) the content, or likely content, of the modern award referred to in paragraph (b) (taking account of any variations of the modern award that are likely to be made in the Part 10A award modernisation process);

(d) the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument;

(e) the extent to which the enterprise instrument provides enterprise‑specific terms and conditions of employment;

(f) the likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;

(g) the views of the persons covered by the enterprise instrument;

(h) any other matter prescribed by the regulations.

Note: A variation referred to in paragraph (c) may, for example, be a variation to reflect the outcome of the AFPC’s final wage review under the WR Act, or to include transitional arrangements in the modern award.

(5A) If the FWC makes a modern enterprise award before the FW (safety net provisions) commencement day, the modern enterprise award must not be expressed to commence on a day earlier than the FW (safety net provisions) commencement day.

Note: For when a modern enterprise award is in operation, see item 17.

(6) The regulations may deal with other matters relating to the enterprise instrument modernisation process.

…

**6 The modern enterprise awards objective**

(1) The modern awards objective and the minimum wages objective apply to the FWC making a modern enterprise award under this Division.

(2) However, in applying the modern awards objective and the minimum wages objective, the FWC must recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. This is the ***modern enterprise awards*** ***objective***.

Note 1: See also item 11 (enterprise instrument modernisation process is not intended to result in reduction in take‑home pay).

Note 2: See also item 16A (how the FW Act applies to the enterprise instrument modernisation process before the FW (safety net provisions) commencement day).

1. In its decision of 15 December 2014, the Commission accepted, following *Yum! Restaurants Australia Pty Ltd v Full Bench* *of Fair Work Australia* (2012) 205 FCR 306, 311 [21], that items 4 and 6 of Sch 6 operated together as a single decision‑making process in which the Commission was involved when deciding whether or not to make a modern enterprise award. It gave consideration to each of the matters listed in item 4(5). Having done so, the Commission said:

68. In our view, in this case the likely impact on the persons covered by the CSR Award 2000, and the persons covered by the relevant modern awards, of a decision to make, or not make, the modern enterprise award strongly supports not making the modern enterprise award to replace the CSR Award 2000. As we have indicated, if we do not make the modern enterprise award the likely impact would quickly be collective bargaining between CSR and the salaried employees and their bargaining representatives for the making of an enterprise agreement or enterprise agreements. We regard the other factors in item 4(5) of schedule 6 of the [TP Act] as supporting the making of the modern enterprise award, although some of the other factors do not unambiguously do so. Nonetheless, in this case the other factors in item 4(5) of schedule 6 of the [TP Act] are not sufficient in our view, either individually or collectively, to outweigh the strong support item 4(5)(f) of schedule 6 provides for not making the modern enterprise award.

1. As is apparent from this passage, it was considerations arising under para (f) of item 4(5) that swung the balance in favour of declining to make a modern enterprise award, in the Commission’s view. Critical to that view were the Commission’s findings that, if a modern enterprise award were not made –

… there would quickly be collective bargaining between CSR and the salaried employees and their bargaining representatives for the making of an enterprise agreement or enterprise agreements.

By contrast:

The likely impact of a decision to make such a modern enterprise award on the persons covered by the CSR Award 2000 would be largely the maintenance of the terms and conditions of employment in the CSR Award 2000 in the modern enterprise award and, consistent with the history between the persons, no enterprise agreement being made.

The Commission noted that declining to make a modern enterprise award would overcome what it described as “the historical inertia with respect to such collective bargaining”.

1. In the result, the Commission rejected the Staff Association’s application for the making of a modern enterprise award.
2. CSR’s first ground for the grant of certiorari and mandamus was that the Commission had failed to comply with the injunction in item 6 of the TP Act that it must apply the “modern awards objective” when making a modern enterprise award under Div 2 of Pt 2 of Sch 6 to the TP Act. That objective is the subject of s 134(1) of the *Fair Work Act 2009* (Cth) (“the FW Act”), as follows:

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

1. For this aspect of CSR’s case to be viable, it is essential that item 6(1) of Sch 6 to the TP Act operated in a way which required the Commission to take account of the modern awards objective when deciding, pursuant to item 4, whether to make a modern enterprise award. The *amicus* submitted that the language of items 4(5) and 6(1) of the schedule provided support for the view that item 4(5) alone prescribed the matters that the Commission was required to take into account when deciding whether to make a modern enterprise award, while both items 4(5) and 6(1) were relevant at the stage of determining the content of such an award, it having been decided to make one. He accepted, however, that such a view could not stand alongside the judgment of the Full Court in *Yum!*, in which it was said (205 FCR at 311 [21]):

Items 4 and 6 operate together such that the “objective” set forth in Item 6(2) forms part of the single decision-making process engaged in when considering “whether or not to make a modern enterprise award”. There are not two clearly separated decision-making processes whereby Item 4(5) alone dictates the considerations to be taken into account when deciding whether or not to make a modern enterprise award and thereafter separate consideration is given to the objectives referred to in Item 6 when determining the content of the modern enterprise award. Rejected are the submissions advanced by Senior Counsel on behalf of the Respondents that consideration should be given at the outset to whether or not an award should be made, and only thereafter to the content of any award.

The *amicus* accepted that a submission that this recent judgment of the Full Court was plainly wrong was not open, and no such submission was made.

1. In the circumstances, the present application must be approached by reference to the proposition that item 6(1) of the schedule applies at the point where the Commission is considering, under item 4, whether or not to make a modern enterprise award.
2. In its decision of 15 December 2014, the Commission referred to the modern awards objective, and set out the terms of s 134(1) of the FW Act. In the deliberative part of its reasons, however, the only reference to this objective was to be found in the following passage:

67. The FWC must apply the modern awards objective and the minimum wages objective to the making of a modern enterprise award, while recognising modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. The modern awards objective requires the FWC to take into account, amongst other things, the need to encourage collective bargaining.

It is clear that “the need to encourage collective bargaining” was considered by the Commission to be a circumstance of considerable discretionary importance. Ultimately, that circumstance lay at the centre of the Commission’s decision to reject the Staff Association’s application.

1. However, the Commission’s decision is devoid of any reference to any of the other items listed in s 134(1) of the FW Act. Further, there is force in the submission made on behalf of CSR that the modern awards objective does not require the Commission to take into account the need to encourage collective bargaining as such: rather, it requires the Commission to ensure that modern awards – including, in the present context established by item 6 of the schedule, modern enterprise awards – together with the national employment standards, “provide a fair and relevant minimum safety net of terms and conditions” taking into account, amongst other things, the need to encourage collective bargaining. The significance of s 134(1), understood in this sense, was not addressed in the Commission’s decision of 15 December 2014.
2. Although there was some uncertainty about the number of CSR employees who would be without modern award coverage in the absence of a modern enterprise award, the Commission was “prepared to assume a significant number of the salaried employees would not be covered” by any other, previously made, modern award. That circumstance, of itself, should have given a sharper edge to the obligation on the Commission under s 134 of the FW Act to ensure that modern awards, together with the standards referred to, provided a fair and relevant safety net of terms and conditions.
3. Looking at the lettered paragraphs in s 134(1), it is not obvious that consideration of any of them would necessarily have led to a different result in the case before the Commission, but that would be a matter for the Commission itself. The Court is in no position to assume that none of them would have. The Court is confined to the conclusion, which clearly appears from the Commission’s reasons, that, with the possible exception of para (b), these paragraphs were not taken into account, as required by the statute.
4. An alternative argument advanced by the *amicus* was that s 134, by its own terms, might be understood as concerned only with the content of modern awards, and as being agnostic on the question whether there should be a safety net of the kind referred to. If so, it was argued, the Commission’s approach in the present case might be regarded as consistent with *Yum!* in the sense that, while Sch 6 to the TP Act did provide for a single, rather than a bifurcated, process, s 134 added nothing, in point of content, to the considerations which it was required to take into account, at least in a case in which it was not persuaded that a modern enterprise award should be made.
5. We would not accept that such an understanding of the operation of s 134 provides a satisfactory basis for distinguishing *Yum!*. In that case, the Full Court referred, (205 FCR at 311-312 [22]) to the conceptual difficulties of determining whether a modern enterprise award should be made without at the same time giving consideration to the possible content of such an award, if one were to be made, and of embarking upon the process of determining whether or not to make a modern enterprise award free of any consideration being given to the modern enterprise awards objective. The reading of item 6(1) in Sch 6 which their Honours rejected, as it seems to us, was one which permitted the Commission to decide whether or not to make a modern enterprise award without obeying the injunction conveyed by s 134(1) of the FW Act. Although dressed differently, in our view this second argument advanced by the *amicus* like the first, could not be accepted consistently with *Yum!*.
6. For the above reasons, we would accept CSR’s contention that, save with respect to the need to encourage collective bargaining, the Commission’s decision was made without reference to the obligation imposed upon it by s 134(1) of the FW Act. This is, in our view, a proper case for mandamus and, in support of that, for certiorari to quash the Commission’s decision.
7. One of the grounds relied upon by CSR and the Staff Association was that the decision of the Commission was illogical, irrational or unreasonable to an extent that would vitiate the decision in a jurisdictional sense. Argument in support of this ground was developed by counsel for the Staff Association. The point was that the Commission’s conclusion that, if a modern enterprise award were not made, there would quickly be collective bargaining for the making of one or more enterprise agreements was illogical in the sense that collective bargaining, however quickly it might commence, need not lead, in a time frame that could on any view be described as “quickly”, to the making of an enterprise agreement. The Court was, in effect, being asked to take judicial notice of the circumstance that, depending on the facts, collective bargaining may proceed for months, even years, without agreement being reached. In the meantime, a large number of those who were covered by the 2000 Award would be covered by no industrial instrument.
8. To the extent that this submission amounts to a complaint that the Commission looked at “the need to encourage collective bargaining” abstracted from the governing introductory passage in s 134(1) of the FW Act, it was dealt with it in paras 15-20 above. Otherwise, the submission is answered by the very terms of s 134(1)(b). The Commission was entitled to regard the parties’ quick resort to collective bargaining as a relevant factor in itself. It was not relevant only by reason of being logically connected to the emergence of an enterprise agreement. Indeed, the state of affairs which the Commission was presumptively obliged to regard as consistent with the policy of the FW Act in relevant respects was one in which there was a modern award safety net in place, but in which the *absence* of an enterprise agreement would encourage collective bargaining to the end of making one. This much was recognised by the Commission, and its reasoning in that regard displayed, in our respectful view, no irrationality, illogicality or unreasonableness.
9. For the reasons given earlier, however, we would grant the remedies referred to.

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| I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Jessup, Bromberg and Katzmann. |

Associate:

Dated: 1 July 2015