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Employee Relations News

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In this edition

Stupar (Mr) bowled for a Gooley (DP) as Deed of Release upheld[1]

The applicant, Mr Mladen Stupar:

- Alleged that the termination of his employment by Australia Post was unfair.
- Participated in a conference.
- Was provided with an interpreter at the conference.
- Signed terms of settlement, which provided for the payment of an amount of money and that "this is a once and for all settlement of all matters arising from the course of the Applicant's employment and the cessation of the Applicant's employment with the Respondent."
- The terms of settlement was signed by Mr Stupar and the interpreter and Australia Post.
- Was paid, on 20 June 2014, the monies payable under the terms of settlement.
- Subsequently made a complaint to the Australian Human Rights Commission which terminated the complaint on the basis the parties had not agreed to participate in a conciliation conference or otherwise resolve the matter. Mr Stupar was advised that he could apply to the Federal Court or Federal Circuit Court. He was advised that he had 60 days to make the application.
- Then wrote to the Commission seeking a meeting with the Commissioner who had conducted the initial conference, because he said he had been deceived.
- A private conference was conducted by Vice President Catanzariti but the dispute remained unresolved.
- Then made an application, by letter, for the Commission to hear and determine whether the terms of settlement should be set aside, claiming that he did not understand that the document he signed would prevent him taking other action against Australia Post and that he had been told by the interpreter that he was only settling his unfair dismissal claim.

Subsequently, Australia Post applied to have Mr Stupar's application dismissed. However, the hearing proceeded on the basis that if Australia Post's application was successful that the matter would be resolved.

At the hearing, Mr Stupar gave evidence about the conciliation conference:

- . The offers to settle and the responses to those offers were conveyed to the parties by the Commissioner.
- The parties were in separate rooms.
- That he signed the terms of settlement.
- That he asked the interpreter to "consult with the lady who was presiding there to check whether I was signing anything that preclude me from chasing those people who not only destroyed my life ... "

[1] Mladen Stupar v Australia Postal Corporation T/A Australia Post [2015] FWC 1090, (U2014/4265). DEPUTY PRESIDENT GOOLEY

- That he was told he was "signing just what I can get from this institution. That is, the payment for the unfair dismissal"
- To the question "did you agree not to pursue the unfair dismissal claim?" Mr Stupar relied "No, never. No way. I would never do that, nor will I do that." When the question was rephrased, Mr Stupar still denied agreeing to settle his unfair dismissal claim.
- He was told that he was signing for a payment for the unfair dismissal.
- He also reiterated that he was told that he could pursue "all avenues regardless of the signature." He said he was told this by the interpreter.

Mr Stupar did not call the interpreter to give evidence about what she said to him at the conciliation conference.

Australia Post did not call any evidence and relied upon the signed terms of settlement [and] submitted that the Commission did not have the jurisdiction to determine the question about whether the agreement was a legally binding document as that would involve the Commission exercising judicial power which it cannot do. The DP agreed.

Australia Post:

- Relied upon the decision of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd and Ors* to support its contention that Australia Post was entitled to rely upon the signature of Mr Stupar and that none of the exceptions referred to in *Alphapharm* applied:

    - That absent misrepresentation or fraud or some other special circumstances a person will be bound by the document the person signs.
    - Further Australia Post submitted that Mr Stupar had given no evidence about his ability to read and understand English. It submitted that Mr Stupar corresponded with the Commission numerous times in English.

  He relied upon the decision of the High Court in *Petelin v Cullen* and a decision of the Industrial Court of Australia in *Cawthray v Stinson Nominees Pty Ltd*.

  Petelin, dealing with an illiterate person who signed a document the Court said in relation to circumstances in which a person will not be held to the document signed:

  "The class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is available to those who through no fault of their own are unable to have any understanding of the purport of particular documents. To make out the defence a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part. Finally it is accepted that there is a heavy onus on a defendant who seeks to establish the defence."

It was submitted that Mr Stupar:

- Did not understand what he was signing but Australia Post wasn't aware of this and hence they are an innocent party.
- However it was said that Mr Stupar was not careless. It was submitted that Mr Stupar asked the interpreter 20 times whether he was releasing more than the unfair dismissal claim.
- Could not read and write English.
- **It was accepted that if the matter proceeded Mr Stupar would need to repay the monies already paid to him** [my emphasis].

Gooley, DP in finding against the applicant:

- **The role of an interpreter was to interpret for Mr Stupar. It was not her role to answer his legal questions [my emphasis].**

- In this case I accept that Mr Stupar intended to settle his unfair dismissal claim.
- I am satisfied that he has been paid the monies in accordance with the terms of settlement.
- Further I am unable to conclude that he, at the time he signed the deed, had not had the terms of the settlement translated for him.
- I am not satisfied on the material before me that I should ignore the signed terms of settlement and permit this matter to proceed.

"Justice delayed is justice denied" – Full court of the Federal Court of Australia critical of 20 month delay by the Federal Circuit Court of Australia's decision making delay.

Whilst I have focused on the "time delay", this matter[2] was an appeal and cross appeal based on six main platforms:

Industrial law:

- Independent contractor or employee.

- General protections – whether termination of engagement occurred because the person. exercised or proposed to exercise workplace right. Noting Jessup J comment:

> *"The much larger question whether s 361(1) of the FW Act operates to reverse the onus of proof upon nothing more than the making of an allegation, without the maker of the allegation being under any obligation first to establish the factual existence of the circumstance which is said to have been the reason for the taking of the adverse action"*

Sham contracting.

Statutory Interpretation: "law of the Commonwealth."

Practice & Procedure:

- **Delay in the delivery of judgment and publication of reasons – whether excessive delay rendered judgment unsafe.** [This is my commentary]

- Alternative claim not decided by trial judge – whether unsuccessful respondent to appeal entitled to have alternative claim determined.

All judges found against the primary judge's delay in the issuing of the decision proper. The phrasing utilised against their fellow judiciary member is interesting (YOU be the judge):

Jessup J found:

Regrettably, there is considerable substance in the complaint which the respondent makes about the delay in the delivery of judgment, and in the publication of reasons, at first instance in the present case.

On the appeal, the respondent caused to be read her own affidavit of 3 February 2015. She said that, on 7 February 2014, more than 15 months after the filing of the last post-hearing submission in the case, she sent an email to the President of the Bar Association, Mr Peter Davis, requesting his assistance in addressing the delay in the resolution of her case. There followed an exchange of correspondence with Mr Davis in which the respondent clarified when final submissions had been filed. It was not until 11 June 2014 that the respondent received an email from the Bar Association, attaching a letter from the court advising that judgment was anticipated by the end of June 2014. The respondent was next advised by the Federal Circuit Court that judgment would be delivered on 26 June 2014, but, on that date, the matter was adjourned to 4 July 2014. On that day, the primary Judge delivered judgment, and his Honour's written reasons were available on 7 July 2014.

[2] Tattsbet Limited v Morrow [2015] FCAFC 62, Appeal from: Morrow v Tattsbet [2014] FCCA 1327. Judges: ALLSOP CJ, JESSUP AND WHITE JJ

The principles which inform the decision of an appellate court to hold that excessive delay in the delivery of judgment at first instance in the case concerned has rendered that judgment unsafe were discussed at length by the Full Court in Expectation Pty Ltd v PRD Realty Pty Ltd (2004) 140 FCR 17, 32-35 [66]-[83]. I would accept that, particularly where a transcript of the evidence at trial exists, mere delay need not justify a conclusion that the fact-finding process has miscarried. There are, however, additional circumstances which give rise to concern in the present case.

In Expectation, the Full Court said (140 FCR 17, 33 [74]):

> *"The problem is not restricted to fading memory. A judge who comes to make an inordinately delayed decision will inevitably be subjected to great pressure to complete and publish the judgment. A conscientious judge could not but feel that pressure. It is almost inevitable that there will also be some form of external pressure — whether from the parties, the management of the Court, the press or parliamentarians. That pressure could well unconsciously affect the process of decision-making and the process of giving reasons for decision. The decision that is easiest to make and express will have great psychological attraction."*

Nonetheless, the pressures to which the Full Court referred in Expectation appear to have been present here. The circumstances which surrounded the delivery of judgment bespeak an environment in which his Honour felt under considerable pressure to complete his reasons at the last minute.

Additionally, the omissions to which I have referred above, taken cumulatively, suggest that his Honour may not have given some issues in the case the attention which they deserved, notwithstanding the very long period during which he was reserved... our attention was also drawn to a number of minor errors – typographical and proofing errors, for example – in his Honour's reasons. While nothing would normally turn on such matters, in the circumstances of the present case it must be accepted that they provide some support for the respondent's second ground.

…Notwithstanding the existence of transcript, that finding was inevitably based upon his Honour's observation of Mr Fletton as a witness, and upon the advantage which a trial Judge conventionally has in such a setting. In my view, there is a real risk that his Honour compromised his ability to use that advantage in the determination of Mr Fletton's reasons for acting when he allowed such an inordinate period to elapse between the giving of the evidence and the making of the determination.

Allsop CJ found:

I wish only to add the following additional comments. First, the delay in the production of the decision was, with respect to the judge, unfortunate: over 20 months from final submissions. The practical realities of life as a judge may mean, sometimes, a degree of delay in decision-making. Pressure and volume of other judicial work, complexity and size of the particular decision-making task at hand, a lack, sometimes, of useful assistance from litigants or the profession, and illness or incapacity are but examples of reasons for delay. Some of the reasons may rest in point of fault; some in point of technique. The burdens on judges in a busy trial court can be enormous. Some reasons may be the responsibility of the Court itself, if too much work is given to a judicial officer without any, or adequate, time or facility to undertake reserved judgments. But systems must be made to cope. Whatever the cause of any particular delay (and there was no explanation available here), its consequences must be examined with an eye to the fair administration of justice.

White J agreed with the above findings, adding no further comment.

Commentary:

Not once was the phrase "Justice delayed is justice denied" was mentioned in any of the decisions ☺

Until next time…

Greg Reiffel
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