FairWork Commission

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Mr Grant Skinner; Mr Mark Pemberton; Mr Joshua Ross; Mr Ian Lucas; Mr Kadin Hill; Ms Abigail Bryant; Mr Mareck Preston

v

Asciano Services Pty Ltd T/A Pacific National Bulk
(C2016/3872)

SENIOR DEPUTY PRESIDENT DRAKE
DEPUTY PRESIDENT ASBURY
COMMISSIONER SAUNDERS SYDNEY, 25 JANUARY 2017

Appeal against decision [2016] FWC 2720 of Commissioner Johns at Melbourne on 4 May 2016 in matter numbers (U2015/9788), U2015/11732), (U2015/9790), (U2015/9795), (U2015/9798), (U2015/9802),(U2015/9805).

[1] This decision concerns an application for permission to appeal and an appeal against the decision of Commissioner Johns (the Decision).[1]

[2] The appeal raises important questions concerning the application of s.389(2) of the *Fair Work Act 2009* (the Act). For that reason permission to appeal the Decision was granted by this Full Bench on 9 August 2016,[2] following a hearing on 16 June 2016.

[3] Concerning Mr Skinner, Mr Pemberton, Mr Ross, Mr Lucas, Mr Hill, Ms Bryant and Mr Preston (the appellants) Commissioner Johns dismissed their applications and found that:

- As a result of the reduction in customer demand in exports of grain, the loss of a customer, NRE Ltd, due to its closure, and the loss of another site from Centennial Coal, a reduction in workload altered the respondent's operational requirements and resulted in labour rationalisation. As a result the role of each of the applicants was no longer required to be performed by anyone.

- It would not have been reasonable in all the circumstances for the respondent to redeploy them.

- The dismissal of each of the applicants was a case of genuine redundancy.

[4] The appeal was heard on 23 September 2016. Permission to be represented by lawyers was granted to each party pursuant to s.596 of the Act. Mr Reitano of Counsel, with Mr Pasfield, solicitor, of Slater and Gordon Lawyers, appeared for the appellants. Mr Meehan

of Counsel, instructed by Mr Almond, solicitor, of Paul Almond Employment Law Pty Ltd, appeared for Asciano Services Pty Ltd T/A Pacific National Bulk (the respondent).

[5] The background to the applications was extensively summarised by Commissioner Johns. We do not intend to reproduce that factual summary in this decision.

Grounds of Appeal

[6] The Notice of Appeal set out the grounds of appeal below:

1. The Commissioner erred in finding in each of the matters appealed from that the applicant's dismissal was a case of genuine redundancy.

2. The Commissioner erred in finding in each of the matters appealed from that it would not have been reasonable for the respondent to redeploy the applicant, with the result that the applicant's dismissal in each case was a genuine redundancy.

3. The Commissioner erred in determining that in considering the reasonableness of redeployment that "*the actions of the employee…[should] be the subject of close scrutiny*" and by closely examining the conduct of redundant employees for any shortcomings.

4. The Commissioner erred in finding in each of the matters appealed from that it would not have been reasonable for the respondent to redeploy the appellant in circumstances where the employer committed to but did not consider the possibility of swaps with employees in other locations.

5. The Commissioner erred in finding that it would not have been reasonable for the respondent to redeploy Mr Skinner in circumstances where the respondent did not advise Mr Skinner of a potential vacancy at Newcastle.

6. The Commissioner erred in finding that it would not have been reasonable for the respondent to redeploy Ms Bryant and Messrs Skinner, Lucas, Ross and Hill in circumstances where the respondent advertised a number of positions at their depot at Parkes shortly after their dismissal.

7. The Commissioner erred in finding that it would not have been reasonable to redeploy Mr Pemberton in circumstances where there was an available position at the Moolabin depot which the respondent decided not to offer Mr Pembleton.

8. The Commissioner erred in finding that it would not have been reasonable to redeploy Mr Ross in circumstances where there were available positions at the respondent's Moss Vale depot.

9. The Commissioner erred in finding that the respondent has consulted with Mr Lucas in circumstances where it provided information by email to Mr Lucas knowing that Mr Lucas was computer illiterate.

10. The Commissioner erred in finding that it would not have been reasonable to redeploy Mr Lucas because he expressed an interest in available positions verbally rather than in writing.

Principles on Appeal

[7] An appeal under s.604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[3] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[8] This appeal is one to which s.400 of the Act applies.[4] Section 400 of the Act provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[9] In the Federal Court Full Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as "a stringent one".[5] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[6] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> *... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters*.[7]

[10] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[8] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[9]

Appellants' Submissions

[11] The appellants provided and relied upon an Outline of Submissions[10] on the application for permission to appeal supplemented by an Outline of Submissions[11] and an Outline of Submissions in Reply[12] at the hearing of the appeal.

[12] Mr Reitano identified the issue as "… whether or not the 'requirement' to reasonably deploy is met by providing employees with a list of vacancies at the time of dismissal and inviting them to apply for one or other of those vacancies."

[13] The appellants identified a number of alleged errors in the Decision.

The first issue

[14] The first issue concerns s.389(2) of the Act which provides that '*a person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed*'.

[15] The Commissioner was required to determine whether *in all the circumstances* it would have been reasonable to redeploy each of the appellants in accordance with the authority of *Ulan Coal Mines Ltd v Honeysett and Ors.* where the Full Bench said:

> "**[31]** The Commissioner found that entities associated with Ulan had vacancies for jobs which were potentially suitable for the dismissed employees and there was no evidence that redeployment from Ulan to the mines operated by these associated enterprises would have any impact on operational efficiency. While the Commissioner decided that some of the employees dismissed by Ulan were encouraged to apply for vacancies at mines operated by associated entities, he also found that neither Xstrata nor its associated entities had a policy of employing persons who might be redundant in other enterprises in the group. In Xstrata's case, this is despite the fact that it had overall managerial control in relation to the mining operations of the associated entities. These findings were open to him. The Commissioner also found no evidence that any of the relevant employees would have been unwilling to be redeployed to one of the other mines. It must be said that all of the evidence was not one way on this issue and, as Ulan's submissions indicate, some of the employees in particular did not display a great deal of energy in following up on vacancies which Ulan brought to their attention. Nevertheless we think it was open to the Commissioner to find that if offered redeployment they would have accepted it."[13]

The second issue

[16] The Commissioner decided that in each case it would not have been reasonable to redeploy the appellants. In doing so the Commissioner failed to deal with the prospect that redeployment of each appellant to a position which they were each well able to perform as a train driver (because it involved exactly the same work as they had been doing and were qualified to do) was reasonably available in the circumstances.

The third issue

[17] The appellants submitted it would have been reasonable to redeploy them given that other employees had expressed a desire to be made voluntarily redundant and also because so many positions were advertised almost immediately after the appellants were dismissed.

[18] The failure to redeploy the appellants occurred in circumstances where the employer had indicated a willingness, at the outset of the redundancy process, to adopt a course involving swaps – it was not only reasonable because it made sense, but also because the

employer had expressly embraced it. The appellants submitted that this factor distinguished the situation of the appellants from the situation in *Gilbert*[14] where, in a single-member decision, Senior Deputy President Hamberger said:

> "**[29]** In assessing the reasonableness of redeployment for the purposes of s.389, it is not necessary for an employer to dismiss other employees in order to create a vacant position for a person whose role has been made redundant. Nor (at least for the purposes of s.389) is it necessary for an employer to offer voluntary redundancy to other employees in order to create a vacant position for a person whose role has been made redundant."

[footnote omitted]

[19] In addition to distinguishing *Gilbert* on the basis that it was not a case where the employer had expressly sanctioned the availability of swaps, the appellants submitted that *Gilbert* was wrongly decided and that this Full Bench should overrule it. The single sentence relied on at [29] does not contain any reasons that support it and it is contrary to reason. It is not clear from the decision of Senior Deputy President Hamberger whether the issue was the subject of full argument. There is no reason why the acceptance of a swap for identical positions (but for their location) should not be considered as something that makes it reasonable in all the circumstances to redeploy someone.

[20] The appellants press this Bench to overturn *Gilbert*, to the extent that it is said to be authority for the proposition that an employer is not required to offer swaps where available when it has an obligation to redeploy an otherwise redundant employee.

The fourth issue

[21] The appellants identified the fourth issue as follows:

> "… there is an issue about the relevance of advertisements for the positions after an employee is dismissed due to redundancy where the employee is able to demonstrate a capacity and willingness to perform the work of that advertised position and where it is reasonable to infer that the employer would have, or should reasonably have, known about the likely existence of the position and the capacity of the employee to perform the duties of that position. The existence of a position involving like work for which a terminated employee is qualified to do so proximate in time to termination due to redundancy is indicative that the employee could have been redeployed rather than have their employment terminated. This is not a caser (sic) where one or two positions were advertised in the weeks following termination of the Appellant's employment – here there were very many positions advertised and very many different locations. The Commissioner by and largely (sic) failed to consider this aspect of the circumstances.
>
> In those cases where the Commissioner did take this into account he seemed to think that it was important that the position advertised was not exactly the same as the one from which the employment was terminated. An example of this was in the case of Mr Hill where the Commissioner put completely to one side the fact of the advertised position because it did not correspond exactly with Mr Hill's position (the position advertised was a casual one and Mr Hills position was permanent). The effect of this

> issue together with the issue about swaps effectively meant that whilst there were very many redeployment positions available none of them were disclosed or offered to any of the Appellants for reasons that were by and large unexplained."

The fifth issue

[22] The fifth issue identified by the appellants was that:

> "… there is an issue about the relevance of the failure of an employee to provide complete information to employees about potential redeployment opportunities and the impact that has upon a determination of the question as to whether redeployment would have been reasonable in the circumstances."

[23] In further submissions regarding the third issue, the appellants submitted that swaps should be an available proposition particularly since one of the evident purposes of s.389(2) is to avoid the use of redundancy as a disguise for dismissing 'underperforming' or unwanted employees. There is no sound reason why s.389(2) should not be read so as to include the prospect of redeployment to a swapped position. That would be something that would be reasonable in all the circumstances.

[24] The appellants submitted that the respondent concedes that it did not inform employees about available swaps although it had the information and could have done so.

[25] Mr Reitano outlined the evidence in relation to available swaps which we will not repeat here. The appellants submitted that this information was a material consideration in the determination of the applications but it was not taken into account by Commissioner Johns.

[26] The appellants submitted that the reasonableness of a swap as redeployment needs to be considered at the time redeployment is offered. It is an available inference on the evidence that swaps at particular depots were known and identified but swaps to other depots were not explored or communicated and this was unreasonable.

[27] Mr Reitano made particular submissions as to the circumstances of each appellant which we do not need to repeat.

Respondent's Submissions

[28] The respondent provided and relied upon an Outline of Submissions[15] tendered at the application for permission to appeal, supplemented by an Outline of Submissions[16] provided at the hearing of the appeal.

[29] The respondent submitted that there was no demonstrable error in the Decision.

[30] It was not disputed before Commissioner Johns that employees identified for retrenchment had the right to lodge a written expression of interest for a role at Enfield or Moss Vale depots during the consultation period and that none of them expressed any interest in those positions.

[31] Mr Meehan took the Bench to an exchange in transcript[17] before Commissioner Johns which he submitted identified the key issue of fact which, when determined, settled the issue:

> "Commissioner Johns: All right. No, I understand now one of the issues in dispute is what did the employees know at the date of termination. If they knew that there were positions at Moss Vale, it's all over red rover isn't it Mr Pryor.
>
> Mr Pryor: That is correct, Commissioner. If they knew at the time, we wouldn't be sitting here today."

[32] Commissioner Johns considered this factual issue in relation to each appellant and determined that all of the appellants knew, after they were given notice of termination and before the end of the 14 day redeployment period, that positions were available for redeployment at Enfield and Moss Vale and that none of them were interested in taking up those opportunities.

[33] That factual determination settled the issue in dispute. The factual determination in relation to each appellant was sound and was a proper basis for his conclusion that it would not have been reasonable in all the circumstances for the appellants to have been redeployed.

[34] Mr Meehan submitted that, as the argument in relation to voluntary swaps was not run before the Commissioner at first instance, that argument should not be permitted to be argued before this Full Bench:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so; *Metwally v University of Wollongong* (No 2) (1985) 60 ALR 68 at 71; *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 7."

The first issue

[35] Mr Meehan submitted that this was a non-issue. None of the appellants applied for the positions at Enfield or Moss Vale and the evidence of Mr King[18] was that if any person affected by the actual redundancies was interested in those roles they would have been allocated the position and they would have been allowed to take up that role.

[36] Mr Meehan provided a summary of the evidence of the appellants in relation to those roles as follows:

I. Grant Skinner (Parkes) – conceded he showed no interest in the available positions as they were not suitable to his circumstances. Also, the Respondent handed to him an expression of interest form, which needed to be returned if employees were interested in redeployment. Mr Skinner did not express interest in any of the available positions.

II. Joshua Ross (Parkes) – said he was told about positions available at Enfield, and that on 3 July 2015 he asked whether roles were available at Moss Vale. His evidence that he was told that Moss Vale was full was not accepted by the

Commissioner on credit grounds, the Commissioner instead preferring the unchallenged evidence of Mr Daley who told Mr Ross that positions were available and asked whether he was interested in roles at Enfield or Moss Vale. Mr Ross did not take any further steps to pursue redeployment.

III. Kadin Hill (Parkes) – communicated to the respondent that he was unable to move due to his current circumstances. He did not file an expression of interest nor pursue any further action in requesting redeployment, but in fact turned down offers of redeployment by the Respondent.

IV. Abigail Bryant (Parkes) – communicated to the Respondent that she was not able to move from Parkes due to her current circumstances. She did not file an expression of interest nor pursue any further action in requesting redeployment, but in fact turned down offers of redeployment by the Respondent.

V. Ian Lucas (Cootamundra) – the proposition of a transfer to Moss Vale was put to Mr Lucas. He took no action to contact the Respondent regarding the possibility of Moss Vale positions being vacant.

VI. Mareck Preston (Cootamundra) – communicated to the Respondent that he was not interested in any of the vacancies on the list given to him on 24 June 2015 or possible opportunities at Moss Vale or Enfield. He told Asciano Careers on 30 June 2015 that he was not interested in discussing available opportunities for redeployment.

VII. Mark Pemberton (Cootamundra) – was only interested in a position at Moolabin, Queensland. He was unsuccessful due to lack of qualifications. He was offered and declined a position at Moss Vale.

[footnotes omitted]

The second issue

[37] Firstly, Mr Meehan submitted that the appellants did not challenge the correctness of the decision in *Gilbert* at first instance.

[38] Secondly, there were no vacant positions at the depots where it is contended that there were possible VR swaps. They were not affected depots. There were no surplus employees at those depots.

[39] Thirdly, the evidence did not support the position that there were employees at Gunnedah, Junee or Werris Creek who would have been willing to take a VR swap with one of the appellants from the affected depots.

[40] Fourthly, in relation to Junee the evidence went no higher than there being contact with Mr King from two employees from Junee who expressed an interest in a VR swap. There is no evidence of these employees having an interest in swapping to Cootamundra or Parkes. There were no questions asked and no evidence that any of the appellants were willing to transfer to Junee, Werris Creek or Gunnedah.

The third issue

[41] Identifiable positions at Enfield and Moss Vale were put to the appellants, as well as others on the careers list. None of the appellants pursued those positions except Mr Pemberton who was interested in a position off the careers list at Moolabin, Queensland. He was unsuccessful in that position application due to a lack of qualifications.

The fourth issue

[42] None of the appellants identified any position which was advertised after the termination of their employment as positions to which they could have been redeployed at the date of their termination of employment.

[43] These advertised positions were casual positions. Mr Meehan submitted that at the time of termination of employment of the appellants the respondent had not made a decision as to how it was to progress the forthcoming grain harvest in terms of labour. It did not have a view of what the demand for grain transport would be and all of the positions advertised post termination of the appellants' employment related to that grain harvest.

[44] Mr Meehan referred to the evidence on that issue and submitted that no casual positions at Cootamundra or Parkes were available at the time that the appellants were dismissed. Section 389(2) of the Act is concerned with circumstances pertaining at the date of dismissal at which date there were no vacant positions to which the appellants could be redeployed.

The fifth issue

[45] There is no proper basis for suggesting that the respondent should have provided complete information about potential future redeployment opportunities. The proper focus is actual vacancies available at the date of dismissal to which an employee can be redeployed. Those vacancies were at Enfield and Moss Vale and were clearly identified.

Consideration and Conclusion

[46] Section 389 of the Act is set out below:

"**389 Meaning of genuine redundancy**

(1) A person's dismissal was a case of **genuine redundancy** if:

(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of **genuine redundancy** if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer."

[47] We granted permission to appeal on 9 August 2016. We did so because we considered that the grounds of appeal raised important questions concerning the operation of s.389(2) of the Act. In particular, in circumstances where the consideration of a swap of the positions of persons identified for retrenchment with persons who were open to a voluntary redundancy has been raised as a possibility by an employer or was a possibility sought by persons identified for retrenchment.

[48] The respondent submitted that this argument should not be dealt with on appeal since it was not raised at first instance. We reject that submission for the following reasons.

[49] The Commissioner referred to the argument concerning potential "VR Swaps" in paragraph [40] of the Decision and then stated (at [68]) that the "RTBU did not press the allegations that the possible VR Swaps with Ronald Gutowski and Mr Mark Beechie were a reasonable form of redeployment". The basis for the Commissioner's view that the RTBU was not pressing its argument in relation to potential "VR Swaps" is not apparent from the Decision.

[50] Mr Meehan submitted that the decision by the RTBU to not press that argument is apparent from the following exchange between the Commissioner and Mr Pryor of the RTBU in submissions:[19]

"Commissioner Johns: All right. No I understand now one of the issues in dispute is what did the employees know at the date of termination? If they knew that there were positions at Moss Vale, it's all over red rover, isn't it Mr Pryor.

Mr Pryor --- That is correct, Commissioner. If they knew at the time, we wouldn't be sitting here today."

[51] That exchange took place in the context of opening oral submissions in which the Commissioner asked Mr Pryor about each of the submissions made on behalf of the respondent in its written outline of submissions. Paragraphs [73] to [80] of the respondent's written outline of opening submissions related to Mr Smith.[20] One of the submissions made on behalf of Mr Smith was that he would have accepted a transfer to Moss Vale if he had been given an opportunity to do so.[21] The respondent contended that Mr Smith was aware of the availability of positions at Moss Vale. The Commissioner explored that issue with Mr Pryor and Mr Meehan in some detail[22] in the opening submissions before making the "all over red rover" comment referred to previously. The Commissioner and Mr Pryor returned to the issue later in the opening oral submissions:[23]

"The Commissioner: So would all nine of them have gone to Moss Vale if they'd known it was available?

> Mr Pryor: All nine would have had the opportunity if it was explored. I'm not saying all nine would have taken the role but certainly some of the applicants would have taken the role, or possibly the VR Swaps to Bathurst, Werris Creek and Gunnedah, Commissioner."

[52] In addition, Mr Pryor made other oral submissions in opening about the "VR Swaps" issue,[24] including after giving his answer to the "red rover" question, and included submissions on that topic in his written outline of opening submissions.[25] Mr Pryor also cross examined a number of the respondent's witnesses about the "VR Swaps" issue[26] and, importantly, made written closing submissions in relation to the issue.[27] Accordingly, we are satisfied that the appellants maintained their "VR Swaps" argument throughout the proceedings at first instance.

[53] We are not persuaded that the casual positions advertised by the respondent after the termination of the appellant's employment were positions vacant at the time of termination of employment or positions that the respondent was likely to have known with any certainty would become available. The possibility of such work becoming available in the future cannot be converted by retrospective wishful thinking into the type of position that could be considered a vacancy available to be filled by redeployment at the date of termination of employment.

[54] In determining whether it would have been reasonable in all of the circumstances to redeploy a person within an enterprise or associated enterprise a number of relevant factors might need to be considered. These will be as varied as the number of enterprises where the issue arises. In *Ulan*[28] the required qualifications for the position, the skills, qualifications and experience of the employee, the location of the position and the level of remuneration were all identified as relevant matters. We consider this to be only a sample of the matters that might be considered.

[55] In *Gilbert* Senior Deputy President Hamberger concluded that it was not necessary for an employer to dismiss other employees in order to create a vacant position to which a person whose role is being made redundant could be transferred. In his view an employer is not obliged to offer voluntary redundancies to other employees to create positions for such persons.

[56] We agree with Senior Deputy President Hamberger that there is no general obligation for an employer to implement or facilitate a process whereby employees whose positions are redundant can swap with other employees who wish to volunteer for redundancy. An employer who does not implement such a process will not automatically be found to have failed to meet the requirement in s.389(2) of the Act for the redundancy to be considered to be genuine.

[57] The redeployment obligation is expressed in the context of "reasonable in all the circumstances". Whether it would have been reasonable in all of the circumstances for an employer to allow employees whose positions are redundant to swap with other employees who wish to volunteer for redundancy, will depend on the facts in the particular case. In the present case:

- The respondent is a large business employing a significant number of employees who undertake the same role as those being made redundant;

- The number of employees performing the same or substantially the same role – train driving – means that allowing a swap would not place onerous training requirements on the respondent;

- In some cases there were potential swaps possibly available in depots reasonably proximate to the depots in which the appellants were working so that the respondent would not have been exposed to costs such as those associated with transferring employees;

- The respondent had previously allowed swaps in similar circumstances; and

- The respondent had suggested this as a possible option to mitigate the effects of redundancy in the round of redundancies which resulted in the dismissal of the appellants.

[58] In these circumstances the possibility of swaps should have been considered, and the respondent's failure to do so, by removing that option from consideration altogether, resulted in the respondent having failed to comply with its obligations under s.389(2). We are not satisfied that the respondent did all that it was required to do in determining whether it would have been reasonable in all the circumstances to redeploy a person whose position is redundant, by allowing that person to swap with another employee who wished to accept redundancy. Contrary to the submission of the respondent, we do not think that making available the possibility of transfers to Enfield and Moss Vale was sufficient compliance with the obligations imposed by s.389(2) of the Act. We are therefore not satisfied that the dismissal of the appellants was a case of genuine redundancy.

[59] We allow the appeal and quash the Decision of Commissioner Johns. The applications will be referred to Commissioner Johns for rehearing.

SENIOR DEPUTY PRESIDENT

Appearances:

R Reitano of Counsel instructed by *P Pasfield* for the appellants.
S Meehan of Counsel instructed by *P Almond* for the respondent.

Hearing details:

Sydney
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2016

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[1] [2016] FWC 2720

[2] PR583969

[3] *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission and Others* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[4] See *Australia Postal* Corporation *v Gorman* [2011] FCA 975 at [37].

[5] (2011) 192 FCR 78 at [43].

[6] *O'Sullivan v Farrer and Another* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46].

[7] [2010] FWAFB 5343 at [27], 197 IR 266.

[8] *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30].

[9] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 288, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler and Others* (2011) 192 FCR 78; *New South Wales Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

[10] Exhibit Appellant 1

[11] Exhibit Appellant 2

[12] Exhibit Appellant 3

[13] *ULAN Coal Mines Ltd v Honeysett & Ors* [2010] FWAFB 7578

[14] *Gilbert & Ors v Asciano* [2015] FWC 364 at [29]

[15] Exhibit Respondent 1

[16] Exhibit Respondent 2

[17] Transcript PN441-442 – Appeal Book p.65

[18] Transcript PN1083 – Appeal Book p.118

[19] Transcript PN441-442 – Appeal Book p.65

[20] Appeal Book p.315-6

[21] Appeal Book p.58 (PN357)

[22] Appeal Book p.58-65

[23] Appeal Book p. 72 (PN563-4)

[24] See for example, Appeal Book p.36 (PN30-8) Appeal Book p.67 (PN484), Appeal Book p.68-9 (PN502-5) and Appeal Book p.70 (PN26-36)

[25] Appeal Book p. 707 ([4(b) &(d)])

[26] See, for example, Appeal Book p.76 (PN611-2)

[27] Appeal Book p.1422-1430 (see, for example, Appeal Book p. 1422 [95]-[99] & Appeal Book p.1423 [105]-[112])

[28] *ULAN Coal Mines Ltd v Honeysett & Ors* [2010] FWAFB 7578 at [29]