Dan Star's Federal Court Judgements

JUNE

INDUSTRIAL LAW

Whether authority under legislation or contract to direct mployee to attend medical examination – Principle of legality – Privilege against self-incrimination to the sphere of employment

Grant v BHP Coal Pty Ltd [2017] FCAFC 42 (10 March 2017) was an appeal from a decision of the primary judge dismissing challenges to decisions of the Fair Work Commission (FWC). The proceedings in the FWC concerned whether the employee was unfairly dismissed from his employment with BHP Coal Pty Ltd. Both a commissioner and the Full Bench of the FWC rejected the employee's claim and the primary judge found that the employee had not established that they had committed error in doing so.

The employee, who was a boilermaker, injured his shoulder at and outside work and was given extended sick leave. Following being certifed by his general practitioner as being fit to return to normal duties, he was directed by a representative of his employer to attend a medical appointment. The employee was dissatisfied with the requirement to attend the medical appointment. He was directed to attend the doctor's appointment and informed that failure to do so would be considered a failure to comply with a reasonable direction and, in a further message, would result in disciplinary action. Subsequently the employee was provided with a notice requiring him to show cause why his employment should not be terminated based on his refusal to attend two medical appointments and his refusal to participate in an interview with the employer's representative. Ultimately, the employee's employment was terminated for those reasons.

The employee argued in his appeal to the Full Court that the primary judge erred in failing to find that the decisions of the FWC were affected by jurisdictional error or error on the face of the record because the FWC at [63]:

1. misconstrued s 39(1)(c) of the *Coal Mining Safety and Health Act 199*9 (Qld) (CMSH Act) as authorising an employer to direct an employee to attend and undergo a medical examination
2. failed to consider the employee's argument that the language of s 39(1)(c) was not sufficiently clear and unambiguous to abrogate an employee's fundamental right not to be subjected to a medical examination
3. erred in finding that privilege against self-incrimination did not apply to the interview with the employer's representative.

→

The Full Court (Dowsett, Barker and Rangiah JJ) dismissed the appeal. The employee's construction of relevant provisions of the CMSH Act was rejected (at [74]-[85]). Further, the principle of legality (explained at [87]-[88]) did not assist the employee and at [90]: "We are satisfied that there is a legislative intention underlying ss 39(1)(c) and (2)(d) of the CMSH Act to curtail the right to personal liberty to the extent that coal mine workers (and others described in those provisions) may be required to attend medical examinations if the circumstances set out in those provisions are met."

It was unnecessary for the Full Court to decide the potentially complex issue of the legality of a requirement by an employer that an employee undergo a medical examination against his or her will in the absence of legislative authority to do so (at [93]-[96]).

The Full Court held it to be well-established that the privilege against self-incrimination is capable of applying to questions asked of an employee by an employer and hence can extend to a workplace interview (at [108]). In accordance with previous authorities the Full Court at [109] stated that "[t]he claimant must show that there is a real and appreciable risk of criminal prosecution if he or she answers, and that he or she has a bona-fide apprehension of that consequence on reasonable grounds" in order to invoke the privilege. However "real and appreciable risk does not exist if a witness' prior statements have already exposed the witness to a risk of prosecution where giving answers will not lead to any increase in jeopardy to which the witness is already exposed."

In the present case, the employee did not make a claim of privilege against self-incrimination at the interview and he merely declined to answer questions unless they were put in writing (at [111]).

In any event, the Full Court held that since the employee did not attempt to demonstrate any error in the decision of the Full Bench of the FWC to decline to consider the argument regarding the privilege against self-incrimination, any error attending the Full Bench's view that privilege did not apply was immaterial (at [112]).

CONSUMER LAW

Non-party redress orders under s 239 of the Australian Consumer Law – Whether an interest under a discretionary trust was property for the purposes of s 239 of th Australian Consumer Law

In *Swishette Pty Ltd v Australian Competition and Consumer Commission* [2017] FCAFC 45 (15 March 2017) the Full Court (Middleton, Foster and Davies JJ) allowed an appeal and set aside certain orders made pursuant to s 239 of the Australian Consumer Law (ACL), which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

Section 239 of the ACL is a remedial provision empowering the Court on application by the regulator, the Australian Competition and Consumer Commission (ACCC), to make orders against the person who engaged in the contravening conduct, or a person involved in that conduct to redress the loss or damage suffered by affected consumers who are not parties to the proceeding, without the need for those persons to be joined as parties (non-party consumers).

The primary judge made orders, based on admissions of the respondents, that there were contraventions of various consumer protection provisions of the ACL. The orders made included a non-party redress order under s 239 of the ACL against the respondents. In addition, the primary judge made a further order under s 239 of the ACL for Mr Laski (one of the respondents) to give a direction on behalf of 'his companies', Swishette Pty Ltd (Swishette) and Letore Pty Ltd (Letore), to the ACCC in relation to the application of the proceeds of sale of a property owned by Swishette which was held in a trust by the ACCC's solicitors pursuant to a freezing order (Order 10) (at [4]-[5]). The background to Order 10 was that Mr Laski was the sole director and the controller of both Swishette and Letore. Swishette's principal activity was to act as trustee of a discretionary trust (the Trust), of which Mr Laski and Letore were both beneficiaries, but not the only beneficiaries. Mr Laski was also the appointor of the Trust. The primary judge held that trust property in the Trust was to be regarded as the "property" of Mr Laski and Order 10 could be made even though Mr Laski, as beneficiary of the Trust, did not have a legal or beneficial interest in that property (at [10]-[12]).

The Full Court accepted Letore's and Swishette's submission that the primary judge did not have the power under s 239 of the ACL to make Order 10 (at [16]). In relation to judgments relied upon by the primary judge, the Full Court said at [21]: "*Whilst Carey (No 6)* [(2006) 153 FCR 509)] is authority that an object of a discretionary trust may have a 'property' interest for the purpose of s 1323 of the Corporations Act, the decision turned on the defined

sense of the word 'property' appearing in that section. So too, whilst there are decisions in the family law jurisdiction which have held that orders can be made under s 79 of the *Family Law Act* in respect of trust property held on the terms of a discretionary trust, those cases have also turned on the defined sense of the word 'property' appearing in s 79. Section 239 is cast in different terms, though, to s 1323 of the *Corporations Act* and s 79 of the *Family Law Act*. The word 'property' does not appear in s 239, nor is there a defined meaning of that word for the purposes of Sub-Division B of Division 4 of Part 5-2 of the *Australian Consumer Law* in which s 239 is contained."

The Full Court stated at [26] that "[o]bjects of a discretionary trust have no beneficial interest in the property of the trust and their only interest is characterised as a mere expectancy coupled with a right to due administration of the trust." Accordingly, the Full Court concluded that Order 10 went beyond the scope of s239(1) by requiring third parties to apply trust property in which Mr Laski has no legal or beneficial interest to the repayment of client moneys, and the primary judge fell into error in concluding that she had the power to make such an order (at [28]).

JULY

TORT LAW

Misfeasance in public office – Elements of the tort – Whether complaint to regulators was exercise of power attached to public office

In *Nyoni v Shire of Kellerberrin* [2017] FCAFC 59 (13 April 2017) the Full Federal Court by majority allowed an appeal in part. The successful appeal ground concerned the tort of misfeasance in public office. The other appeal grounds which raised issues such a trespass and misleading or deceptive conduct failed.

The appellant, Mr Nyoni, was a pharmacist who operated the only pharmacy in Kellerberrin, Western Australia. He contended that Mr Friend, the Chief Executive Officer (CEO) of the Kellerberrin Shire Council (Shire), provided false information about the pharmacy to the Pharmaceutical Council of Western Australia and the Western Australian Department of Health in order to have to take action against Mr Nyoni with the effect of causing him to cease operating the Kellerberrin pharmacy and ultimately be replaced by another pharmacist.

The primary judge dismissed the claim of misfeasance in public office on the basis that Mr Friend was not exercising the powers attaching to his public office of CEO when making the complaint about Mr Nyoni's conduct to the regulatory bodies (at [66]). The key issue in the appeal concerning misfeasance in public office was whether the primary judge was correct to hold that Mr Friend did not exercise the powers attaching to his public office of the Shire's CEO when making his complaint to the regulators.

The majority of Full Court (North and Rares JJ) undertook a detailed examination of Australian and overseas jurisprudence regarding misfeasance in public office (at [76]-[100]). This included the High Court authorities of *Northern Territory v Mengel* (1995) 185 CLR 307 and *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146. The joint judgment of North and Rares JJ explained at [97]: "The elements of the tort of misfeasance in public office have been crafted carefully to ensure that they do not encompass the negligent or unintentional acts or omissions of a public official. The tort requires, *first*, a misuse of an office or power, *secondly*, the intentional element that the officer did so either with the intention of harming a person or class of persons or knowing that he, she or it was acting in excess of his, her or its power, and, *thirdly*, that the plaintiff (or applicant) suffered special damage or, to use Lord Bingham's more modern characterisation, 'material damage' such as financial loss, physical or mental injury, including recognised psychiatric injury (but not merely distress, injured feelings, indignation or annoyance): see *Watkins* [2006] 2 AC at 403 [7], 410 [27]."

North and Rares JJ found that each of these elements was established. Based on the primary judge's findings, Mr Friend acted for an ulterior and improper purpose of intending to injure Mr Nyoni (at [75] and [118]). Further, the making of the allegation by a public officer or body, such as Mr Friend or the Shire, to another government agency or authority with regulatory powers over a person in Mr Nyoni's position should be presumed (as it would in cases of slander) to cause sufficient material or actual damage to support the action of misfeasance in public office (at [101]).

Although Mr Friend did not have power in his capacity as the Shire's CEO to direct the regulator's actions, the majority held that the position of CEO included the power to make complaints to other governmental authorities about matters directly affecting the interests of the Shire (at [106]).

In an analysis of the law at [109], the joint judgment stated: "The tort of misfeasance in public office involves a misuse of the power of the office. The officer must either intend that misuse to cause harm (whether or not the exercise of the power is within its scope) or know that he or she is acting in excess of his or her power: *Mengel* 185 CLR at 345. That is, depending on the officer's state of mind in exercising the power, the misuse can be one that →

would be within the power (i.e. a use that, if coupled with an intention to use it that was not to cause harm, would be lawful) or in excess of the power (i.e. a use for which, in essence, there is no power because the officer knows that the act is beyond – in excess of – the power). Nonetheless, it is necessary to establish that the alleged misfeasance is connected to a power or function that the officer has by virtue, or as an incident, of his or her public office."

The majority distinguished cases involving false reports to superiors (such as *Emanuele v Hedley* (1998) 179 FCR 290) on the basis that Mr Friend's exercise of his power was complete upon making the complaint, and that the regulatory bodies were not superiors (at [111]-[114]).

The majority judges remitted the assessment of damages, including aggravated and or exemplary damages, to the primary judge who had the advantage of seeing and hearing the witnesses over a lengthy trial (at [119]).

Justice Dowsett dissented. His Honour found that it had not been demonstrated that safeguarding the availability of pharmaceutical services in Kellerberrin was part of the Shire's function, let alone the function of its CEO (at [164]-[165]). Further, Dowsett J held Mr Friend's conduct to be no more performed in public office then the reporting of a conversation to a superior as in *Emanuele* (at [165]).

PRACTICE AND PROCEDURE – EVIDENCE

Advance rulings under s 192A of the *Evidence Act 1995* (Cth)

In Australian Securities and Investments Commission, in the matter of *Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd* [2017] FCA 324 (30 March 2017) ASIC applied for a ruling under s 192A(b) of the Evidence Act 1995 (Cth) about whether certain documents in ASIC's possession were prevented by ss 118 or 119 of that Act from being adduced in evidence at the final hearing of these proceedings. Justice Gleeson considered the principles relevant to the Court's discretion whether to make an advance ruling on the admissibility of evidence (at [21]-[24]). Her Honour held it was appropriate to give the ruling applied for by the ASIC (at [29]) and proceeded to do so.

SECURITY FOR COSTS

Estimates of costs for security for costs application – Duplication and division of work between solicitors and counsel

Armstrong Scalisi Holdings Pty Ltd v Piscopo (Trustee), *in the matter of Collins* [2017] FCA 423 (21 March 2017) was an application for security for costs under s 1335 of the *Corporations Act 2001* (Cth). In this context, Rares J made strong comments concerning the practice of solicitors charging clients substantial fees for work that was primarily the responsibility of counsel. The total amount of security sought was approximately $140 000 which was 60% of the estimate of approximately $240 000 for the defendant's total costs and disbursements (at [17]).

Rares J observed that the amount sought and the total estimate appeared to him to be very large and involved the participation of a large number of solicitors in performing work at rates far greater than counsel's rates for tasks that appeared primarily to be the responsibility of counsel (at [17] and examples at [18]). Rares J said the division of work and costs did not comply with the requirements of Part VB of the *Federal Court of Australia Act 1976* (Cth) and the overarching purpose of the civil practice and procedure rules; and reflected, on its face, an inefficient and inappropriate way of dealing with the preparation for, and conduct of the hearing of, the case (at [20]).

Rares J stated at [23]: "I am not intending to direct criticism in these reasons towards the particular solicitor ... That is because I am not suggesting that this is an isolated situation. To the contrary, it appears to have become a more general model for solicitors to do work that the purpose of having a separate bar was originally intended to ensure be done by the specialised and most cost-efficient advocate, namely counsel. All too often, in looking at security for costs applications, the amounts estimated to be incurred by solicitors in preparing cases, as opposed to the amounts estimated to be incurred by counsel, involve a skewing of work towards the solicitors' efforts that does not seem to be efficient or appropriate in the preparation or presentation of the particular case. Where counsel has to make the forensic decisions as to how the material facts should be pleaded, what pleadings are maintainable, what evidence is to be led and what submissions should be drafted, it is of vital importance that counsel undertake the burden of doing that work themselves and not have it duplicated unnecessarily by the involvement in preparing drafts of one, let alone multiple, solicitors."

Security for costs was granted in stages for a total amount of $77 000 (at [30]).

Dan Star QC is a Senior Counsel at the Victorian Bar, telephone (03) 9225 8757 or email *danstar@vicbar.com.au*. The full version of these judgments can be found at *www.austlii.edu.au*. Numbers in square brackets refer to a paragraph number in the judgment.

Crossword Answers

ACROSS: 1. Deed 5. Verdict 7. Advocacy 10. Clerk 11. Void 13. Convict 14. Perpetrator 17. Probate 20. Bond 21. Gag 22. Undue 25. May 27. Cyber Precedent 30. Bench 31. Prenuptial 32. Accused 33. Beneficiary 34. Quasi 35. Restitution 36. Comply 39. Habeas Corpus 40. In situ 41. FOI
DOWN: 1. Deal 2. Entrapment 3. Parole 4. CCTV 6. Testify 8. Vexatious 9. Cite 12. Arraign 13. Chopper 15. Presumption 16. Trust account 17. Peggy Cheong 18. Annul 19. Debtor 23. Blue Heelers 24. Substantiation 25. Mandamus 26. Preliminary 28. Per se 29. Ante 32. Adjourn 34. Quash 36. Costs 37. Proof 38. Real 39. Hoc