FEDERAL COURT OF AUSTRALIA

Inspector Darren Lang v ACN 078 899 591 Pty Ltd t/as Kohinoor Indian Centre

[2009] FCA 987

INSPECTOR DARREN LANG v ACN 078 899 591 PTY LTD T/AS KOHINOOR INDIAN CENTRE, MR GUNASENA ATHUGALAGE and MRS THILAKA ATHUGALAGE
ACD 16 of 2008

PERRAM J
4 SEPTEMBER 2009
CANBERRA

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION **ACD 16 of 2008**

BETWEEN:	**INSPECTOR DARREN LANG** **Applicant**
AND:	**ACN 078 899 591 PTY LTD T/AS KOHINOOR INDIAN CENTRE** **First Respondent**
	MR GUNASENA ATHUGALAGE **Second Respondent**
	MRS THILAKA ATHUGALAGE **Third Respondent**

JUDGE:	**PERRAM J**
DATE OF ORDER:	**4 SEPTEMBER 2009**
WHERE MADE:	**CANBERRA**

THE COURT ORDERS THAT:

1. The applicant is to pay the costs of the second and third respondents.

2. The applicant is to pay the costs of the first respondent insofar as it relates to claims for compensation arising prior to 4 June 2002.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION **ACD 16 of 2008**

BETWEEN:	**INSPECTOR DARREN LANG** **Applicant**
AND:	**ACN 078 899 591 PTY LTD T/AS KOHINOOR INDIAN CENTRE** **First Respondent**
	MR GUNASENA ATHUGALAGE **Second Respondent**
	MRS THILAKA ATHUGALAGE **Third Respondent**
JUDGE:	**PERRAM J**
DATE:	**4 SEPTEMBER 2009**
PLACE:	**CANBERRA**

REASONS FOR JUDGMENT

1 Mr Premachandra was employed by the respondent as a chef at the Blue Elephant Restaurant which is located at Braddon in the Australian Capital Territory. There were disagreements between Mr Premachandra and his employer about the way in which he was treated and the amount which he was paid. He left the Blue Elephant in early 2003. He had commenced his employment there in November 2000 so that in all the employment relationship lasted a little over two years.

2 The applicant is a workplace inspector presently holding office under the provisions of the *Fair Work Act 2009* (Cth) ("the Fair Work Act"). At the times relevant to this litigation he held office under the then provisions of the *Workplace Relations Act 1996* (Cth) ("the 1996 Act"). On 5 June 2008 the inspector commenced the present proceedings against Mr Premachandra's employer contending, amongst other things, that the employer had not paid him the correct wage and that he had not paid him overtime which he was due. Other

allegations, too, were made. The inspector sought the imposition of a penalty and the payment to Mr Premachandra of his unpaid entitlements.

3 The case was listed for hearing before me on 7 and 8 July 2009. During the course of the first day the parties reached an accommodation and, at that time, I made orders giving it effect. I made the following three declarations:

> 1. The First Respondent has breached clause 19 of the *Liquor and Allied Industries Catering, Café, Restaurant, Etc. (Australian Capital Territory) Award 1998* (**Award**) in respect of payments owed to its former employee Mr Lalith Premachandra (**Mr Premachandra**) in that the First Respondent did not pay Mr Premachandra pursuant to the classification "Level 3 Hospitality Service".
>
> 2. The First Respondent has breached clause 28.1 of the Award in respect of payments owed to Mr Premachandra.
>
> 3. The First Respondent has breached clause 28.2 of the Award in respect of payments owed to Mr Premachandra.

I also made an order that:

> 4. The First Respondent pay a penalty of $3,200 and pay $16,800 to Mr Premachandra pursuant to s 178(6) of the pre-reform version of the *Workplace Relations Act 1996.*

4 There remained between the parties two issues about costs which were then argued before me. These reasons deal with those issues, the reasons why it was appropriate to accede to the parties' agreed orders and the effect on the proceedings of the commencement on 1 July 2009 of the Fair Work Act. It is convenient to deal with that last matter first.

The *Fair Work Act 2009 (Cth)*

5 Mr Premachandra ceased working at the Blue Elephant in early 2003 but the inspector did not commence these proceedings for another five years, until 5 June 2008. During that period there was passed into law the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which is better known as Work Choices. Work Choices made substantial changes to the form of the 1996 Act. It was accompanied by complex transitional provisions to which, regrettably, it will be necessary to return. It commenced on 27 March 2006.

6 Work Choices was passed by the 41st Parliament in the Spring of 2005. In the Autumn of 2009 the 42nd Parliament passed the Fair Work Act which came into force on 1 July 2009. It largely repealed the 1996 Act and, with it, most of Work Choices. In the modern style, it too is accompanied by elaborate transitional provisions.

7 The timing of Mr Premachandra' employment and the inspector's proceedings mean that both are enmeshed in not one, but two sets of transitional regimes. As will become apparent, the encounter with the transitional regime for the Fair Work Act is relatively benign; however, the same cannot be said of Work Choices.

8 Clause 11 of Part 3 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("the Transition Act") provides:

> *11 Conduct before repeal – WR Act continues to apply*
>
> *Conduct before repeal*
>
> *(1) The WR Act continues to apply, on and after the WR Act repeal day, in relation to conduct that occurred before the WR Act repeal day.*

9 The "WR Act" is elsewhere defined to mean the 1996 Act. Item 5 of Part 1 of Schedule 2 provides:

> *5 Provisions that apply repealed provisions of the WR Act*
>
> *(1) If a provision of a transitional Schedule provides for provisions (the applied WR Act provisions) of the WR Act to apply on and after the WR Act repeal day, any other provisions of the WR Act, and any regulations or other instruments made under that Act, that are necessary for the effectual operation of the applied WR Act provisions also apply on and after that day.*

10 The operation of those two provisions means that the 1996 Act as in force at the times relevant to Mr Prachamandra's employment continues to apply. The jurisdiction of this Court arises from item 21 of Part 5 of Schedule 17 of the Transition Act:

> *Jurisdiction of courts*
>
> *21 Conferring jurisdiction on the Federal Court*
>
> *Jurisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under:*
>
> *(a) this Act; or*

(b) the WR Act as it continues to apply because of this Act

Appropriateness of the orders

11 The parties agreed that I should make the declarations, impose the penalty and award the compensation set out above. There is some tension in the authorities whether declarations can be made by consent or whether the Court needs first to be satisfied that their making is appropriate. I need not enter into that debate since I am, in fact, satisfied that the evidence justifies the making of the declarations. I would say, however, that a perception amongst the profession that settlements might not be given effect to is a state of affairs which may retard settlement rates. Viewed through that prism, some of the traditional anxieties about the making of such declarations may need to be revisited in light of modern conditions: cf. *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd (ACN 075 400 529)* (2007) 236 ALR 665 at 680-681 [54]-[59] per Kiefel J; *Bank of Kuwait and the Middle East v Ship MV "Mawashi Al Gasseem" (No. 2)* (2007) 240 ALR 120 at 122-123 [10]-[15] per Mansfield J. This is particularly so in small industrial matters such as the present where the resources of the parties do not, in practical terms, permit the kind of litigation that often accompanies hearings on agreed penalties in large civil penalty proceedings. Unlike such cases, proceedings of the present kind are frequently settled on the steps of the Court.

12 I was satisfied that the declarations in this proceeding were appropriate because, *first*, it was plain that I had the power to make them and *secondly,* because the evidence disclosed that the employer did pay Mr Premachandra the wrong wage and did not properly deal with his overtime.

13 The course of authority in this Court also requires me to be satisfied that the penalty agreed by the parties is within the permissible range of penalties which might be imposed: cf. *NW Frozen Foods Pty Ltd v Australian Competition Consumer Commission* (1996) 71 FCR 285 at 290-291 per Burchett, Carr and Kieffel JJ. The penalty which could be imposed for the present matter is governed by s 178(4)(b) of the 1996 Act as it was during Mr Premachandra's employment. It provided for a maximum penalty of $10,000. There was before me no evidence of any prior contraventions. The objective seriousness of the matter is not at the higher end and the effect on Mr Premachandra, whilst no doubt significant from his perspective, concerned only a single employee and took place over a relatively short period

of time. In those circumstances, the penalty of $3,200 which the parties agreed upon was within the permissible range. It was for those reasons that I made the agreed declarations and imposed the agreed penalty on 7 July 2009.

Costs

14 Two issues remained. The first concerned the inspector's joinder to the proceedings of the second and third respondents who are directors of the employer. This was done on the basis that they had been involved in the employer's misconduct towards Mr Premachandra. Work Choices introduced into the 1996 Act s 728 which permitted a claim to be brought against a person who was *involved* in a contravention of an award. However, Mr Premachandra's employment ceased before Work Choices came into effect and there was no provision of an equivalent kind antedating Work Choices.

15 The directors therefore argued that since s 728 was not in force at the time of Mr Premachandra's employment, the claim against them under it was doomed to fail. Although costs were not generally to be awarded in matters arising under the 1996 Act this was not so where the proceedings were instituted without reasonable cause: *Kanan v Australian Postal and Telecommunication Union* (1992) 43 IR 257 at 264-265 per Wilcox J; *Zhang v The Royal Australian Chemical Institute Inc (No. 2)* (2005) 144 FCR 347 at 354 [49]-[59] per Spender, Kenny and Lander JJ. The commencement of an action which could not possibly succeed should be so characterised, with the consequence that the inspector should be ordered to pay the employer's costs: *Australian and International Pilots Association v Qantas Airways Ltd (No. 3)* (2007) 162 FCR 392 at 402 [36] per Tracey J.

16 In response, the inspector pointed to s 728(1) and (2) of the 1996 Act as it was in force at the time the action was commenced, that is, after Mr Premachandra's employment had ceased. It was in these terms:

> (1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.
>
> (2) For this purpose, a person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or

otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

17 Mr Ward, who appeared for the inspector, submitted that subsection (2) operated to deem a person to be "involved in" a contravention if any of subsections (a)-(d) were satisfied. Those subsections were expressed in the past tense so that, literally, they were satisfied by events taking place prior to the introduction of s 728 by Work Choices. Thus, Mr Ward submitted, if the requirements of subsections (a)-(d) were met, subsection (2) deemed the perpetrator to be "involved in" a contravention, and subsection (1) deemed that involvement itself to be a contravention.

18 This was not, it was emphasised, to give s 728 a retrospective effect for the statutory device of enacting legislation which creates present rights by reference to past events was well-established: cf. *The Queen v Humby; ex parte Rooney* (1973) 129 CLR 231. It followed, so Mr Ward submitted, that it was permissible to seek relief under s 728 with respect to matters arising before its introduction. So viewed, there was a respectable argument that the directors could be joined under s 728 and it followed, therefore, that there could be no suggestion that proceedings thus commenced were unreasonably commenced within the meaning of s 824(1).

19 The ingenuity of this engaging argument may be accepted but its correctness should not. This is because it is undone by the transitional provisions in Work Choices whose inky depths it is now necessary to plumb.

20 Section 728(2) is not to be read in isolation but instead as an adjunct to the provision authorising the imposition of civil penalties generally. That provision is s 719. The need to read s 728(2) in that way arises from s 727 which provides that the division containing both sections "sets out rules that apply for the purposes of ... section 719". Section 719 does not count among its virtues brevity, however, only subsection (1) is presently relevant. It provides:

(1) An eligible court may impose a penalty in accordance with this Division on a person if:

(a) the person is bound by an applicable provision; and

(b) the person breaches the provision.

21 The expression "applicable provision" is defined in s 717 to encompass a number of instruments including an "award". The expression "award" is defined in s 4 to mean a "pre-reform award", a term itself defined in the same section to mean:

> ... an instrument that has effect after the reform commencement under item 4 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*.

22 The "reform commencement" is 27 March 2006, the day Work Choices substantively commenced. Clause 4(1) of Schedule 4 to Work Choices provided that an "award" is an award within the meaning of the 1996 Act immediately prior to the passage of the Work Choices amendments. I interpolate that the award the subject of these proceedings – the *Liquor and Allied Industry Catering, Café, Restaurant etc (Australian Capital Territory) Award 1998* – is such an award. Clause 4(3) then provided that:

> The original award is taken to be replaced by an instrument (the ***pre-reform award***) in the same terms as the original award that, on and from the reform commencement, has effect under the *Workplace Relations Act 1996* and binds the following:
>
> (a) each employer that was bound immediately before the reform commencement by the original award;
>
> (b) each organisation that was bound immediately before the reform commencement by the original award;
>
> (c) each employee of an employer referred to in paragraph (a), in relation to the employee's employment by the employer, to the extent that the original award regulates work performed by the employee;
>
> (d) each entity that was bound immediately before the reform commencement by the original award, but only in relation to outworker terms.

23 The upshot of these provisions, for those who have endured this far, is that s 728(2) only applied to a breach of the deemed industrial instrument which came into existence on the commencement of Work Choices. It follows that whilst it may be true, as Mr Ward submits, that s 728(2) is capable of picking up past events preceding its passage, that potential is limited, at least in this case, by the requirement that the breach, involvement in which is alleged, is a breach of a "pre-reform award". Clarity is enhanced when it is

understood that the expression "pre-reform award" refers to species of award coming into existence after the Work Choices reforms. Since the award in question is not a pre-reform award, s 728 cannot apply.

24 If follows that the claims against the directors was doomed from the start.

25 It is not clear to me whether there is a discretion not to award costs once the preconditions to s 824(1) satisfied. However, even if there were a discretion I would not exercise it in favour of the inspector. The correspondence written on his behalf suggests that a complete understanding of the transitional provisions had not been acquired by his advisors. Whilst one can feel a certain sympathy for those whose task it is to chart a course through the perilous shoals of the transitional provisions, it is appropriate to proceed on the basis that those enforcing the legislation in a penal manner should do so correctly. There will be a costs order.

26 The second costs issue arose this way. I was informed that the relief sought related in part to events which had occurred prior to 5 June 2002, that is, more than 6 years before the commencement of the proceedings. For reasons I have already given, s 728 did not support the making of orders in respect of a contravention of an award occurring prior to the commencement of Work Choices. Section 178(8) of the 1996 Act prior to Work Choices provided:

> A proceeding under this section in relation to a breach of a term of an award, order or agreement shall be commenced not later than 6 years after the commission of the breach.

27 The employer submitted that, insofar as the proceeding related to events prior to 5 June 2002, it was doomed from the start. The inspector submitted that this was not so because s 178, in its pre-Work Choices form, could apply to breaches occurring more than 6 years before the commencement of a proceeding. So much flowed, so it was said, from s 178(2) which provided:

> Subject to subsection (3), where:
>
> (a) 2 or more breaches of a term of an award, order or agreement are committed by the same organisation or person; and
>
> (b) the breaches arose out of a course of conduct by the organisation or person;

> the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

28 This meant that if a group of breaches arose from a course of conduct they were to be consolidated into a single breach, even if some of the breaches were outside the relevant limitation period. Here, the breaches alleged were submitted by the inspector to have arisen out of a single course of conduct.

29 So far as compensation (as opposed to the imposition of a penalty) is concerned this argument should be rejected. Subjection (7) provided:

> An order shall not be made under section (6) or (6A) in relation to so much of an underpayment as relates to any period more than 6 years before the commencement of the proceedings.

30 Even where the consolidation wrought by subsection (2) occurs, subsection (7) continues to render unrecoverable those payments which are due from a time more than six years before the commencement of the proceedings.

31 However, there is no such provision in the case of the imposition of a penalty under subsection (1). Because the evident intent of subsection (2) is to permit the treatment of a single course of conduct as a single event it may, I think, be accepted that it is capable of operating in the way the inspector submits.

32 Minds may differ on the question of whether the conduct involved here was a single course of conduct. Neither party took me to any evidence about that issue and I was not referred to any parts of the pleadings which I have, accordingly, disregarded. Doing the best that I can, it seems to me at least arguable that breaches of an award said to consist of underpayments and failures properly to deal with overtime could, conceivably, be seen as a single course of conduct. If that proposition be arguable, as I think it is, then the commencement of a proceeding for the imposition of a penalty in respect of the commission of such a course of conduct could not, I think, properly be described as either vexatious or unreasonably commenced. It follows that I decline to make a costs order in relation to those matters.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate: 

Dated: 4 September 2009

Counsel for the Applicant:	Dr C. S. Ward
Solicitor for the Applicant:	Clayton-Utz
Counsel for the Respondents:	Mr M. Gibian
Solicitor for the Respondents:	Colquhoun Murphy Barristers & Solicitors
Date of Hearing:	7 July 2009
Date of Judgment:	4 September 2009