Contract Based Claims under the *Fair Work Act* Post *Barker*

A seminar jointed hosted by the Law Society of Tasmania and the Law Council of Australia[1]

Ingmar Taylor SC, State Chambers

Thursday, 26 March 2015

1. Last year the High Court decided it was not prepared to find that an employee's rights at common law include a contractual implied term of mutual trust and confidence, noting that such a term was a matter more appropriate for the legislature than for the courts to determine.[2] From at least 1900 Australian legislatures have sought to regulate contracts of employment.[3] Legislative involvement increased significantly at a federal level with the *WorkChoices* amendments which overlaid the contract of employment with a series of minimum legislative benefits. It is an approach that has been continued and added to by the *Fair Work Act 2009* (Cth) (**the FW Act**).

2. This paper brings attention to three particular ways by which the FW Act provides statutory remedies arising from a contract of employment.

Breach of contract/s323

3. In two recent cases the Federal Court has determined that a failure to make a payment due under a contract of employment amounts to a breach of the FW Act giving rise to a right to seek a penalty and a right to seek an order for back-payment.

4. In the first case, *Murrihy v Betezy.com.au Pty Limited*[4] an employee commenced proceedings alleging a failure to pay her commission payments, bonuses and short payments of salary due under her contract. She alleged amongst other matters, that these failures amounted to a contravention of s323 of the FW Act.

[1] This paper was originally prepared for the Industrial Relations Society of South Australia 2014 Annual Convention on 17 October 2014.
[2] *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [40].
[3] *Truck Act 1900* (NSW); *Truck Act 1899* (WA); *Wages Act 1918* (Qld), Part III – Truck; *Truck Act 1900* (ACT).
[4] [2013] FCA 908.

5. In the second case, *APESMA v Wollongong Coal Ltd*,[5] APESMA, a registered organisation, alleged that multiple employees of two related coal mining companies had not been paid bonuses that they were due pursuant to the terms of their contracts of employment and sought penalties and orders for compensation relying again on s323.

6. Section 323 is in the following terms:

> (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
>
> (a) in full (except as provided by section 324); and
>
> (b) in money by one, or a combination, of the methods referred to in subsection (2); and
>
> (c) at least monthly.
>
> Note 1: This subsection is a civil remedy provision (see Part 4-1).
>
> Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings;
>
> (c) monetary allowances;
>
> (d) overtime or penalty rates;
>
> (e) leave payments.

7. Section 323 addresses the same mischief as addressed by the 'Truck Acts' as they had come to exist in each State.[6] That mischief was described by the High Court[7] as being "that an employee's entitlement to payment for work might be compromised by an employer requiring the employee to accept some form of payment in kind of less value than the payment of money foregone". However, whilst replacing the 'Truck Acts' s323 appears to be broader in its import, not being limited to merely preventing unauthorised "deductions" but requiring payments to be made "in full" when they "become payable".

8. In both *Betezy* and *Wollongong Coal* the Applicants' case was based upon the failure of the employer to make payment "in full".

---

[5] [2014] FCA 878.

[6] See *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 634 [45], referring to the *Industrial Relations Act 1996* (NSW), ss 117–118; *Victorian Workers' Wages Protection Act 2007* (Vic), ss 6–7; *Fair Work Act 1994* (SA), s 68; *Industrial Relations Act 1999* (Q), ss 391–393; *Minimum Conditions of Employment Act 1993* (WA), ss 17B–17D; *Industrial Relations Act 1984* (Tas), s 51. Note, prior to the commencement of the *Fair Work Act 2009* the issue of method and frequency of payment in respect of employees covered by Federal legislation tended to be dealt with by State legislation as a consequence of subs 16(3)(h) of the *Workplace Relations Act 1996* which had the effect of preserving State legislation in respect of "the method of payment of wages and salaries".

[7] *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 634 [45].

9. In the *Betezy* case Jessup J considered a failure to pay commission due under the Applicant's contract of employment to be "clearly" a contravention of s323[8] (although the point was not argued as the employer accepted that a failure to pay entitlements, if established, would involve a contravention of s323). At [142] Jessup J said:

> A significant innovation introduced by the FW Act was the imposition of an obligation upon a "national system employer" (such as each of the respondents was) to pay its employees amounts payable to them in relation to the performance of work in full at least monthly: s323(1) of the FW Act. Thus the legislation picks up, amongst other things, entitlements arising under contracts of employment and gives statutory consequences to an employer's failure to make good on them. In this respect, s323(1) is a civil remedy provision.

10. The decision in *Wollongong Coal* involved an application by the Respondents to strike out the proceedings on the basis that a failure to make payments due under a contract could not amount to a breach of s323. Buchanan J rejected the submission. He held that he should approach the question of construction of s323 in conformity with the views expressed by Jessup J both as a matter of comity but also because Buchanan J "regarded the language of s323 as sufficiently wide to accommodate the present proceedings". His Honour went on to say that he did not accept the more confined construction advanced by the Respondents which limited s323 to cases involving unauthorised deductions.[9]

11. A failure to comply with s323 is a failure to comply with a "civil remedy provision". That has two consequences. First, each failure gives rise to a potential penalty of up to $51,000 in respect of a corporate employer under s546. Second, the Federal Court or Federal Circuit Court has power under s545 to make such order of compensation as it considers appropriate. Subsection 545(2) makes clear that the court's powers extend to a power to make an order compensating a person for loss arising from a contravention of a civil remedy provision. Accordingly, upon a failure to pay "in full" contrary to s323 the federal Courts can both impose a penalty and order the employer to pay the amount underpaid plus interest. Further, while not authoritatively determined, it seems clear that such power to award compensation extends to those "involved in" the contravention pursuant to s550.[10] Hence in cases where the employer is insolvent such orders might be sought against directors or managers if it can be shown they were "involved in" the contravention.

12. It has long been the case that underpayments due under an industrial instrument can be pursued by a union or employee before a Court with appropriate jurisdiction and, at the discretion of the applicant, penalties for breach of the industrial instrument can be sought at the same time.

---

[8] At [119].
[9] At [36].
[10] As was done in *McDonald v Il Migliore Pty Limited (No 2)* [2014] FCCA 1110 and *TWU (NSW) v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982 although in each case the question of the court's power to award compensation against accessories was not argued. In the latter case Flick J did not accept the power granted by s545(1) extended to a power to ban a director, but expressed no concern regarding other proposed consent orders by which the directors were required to pay compensation in addition to penalties. Some have questioned whether a power to award compensation against accessories exists, noting paragraph [2177] of the EM which appears to say it does not, notwithstanding the broad power conferred by s545. Cf *AFMPUIU v Beynon* [2013] FCA 390 at [21].

13. Traditionally, underpayments due under a contract of employment could not be pursued in the same way. They had to be pursued by way common law proceedings commenced in the name of the employee before a court of general jurisdiction where costs are usually awarded in favour of the successful party.

14. *Betezy* and *Wollongong Coal* are significant in that they establish that a union can commence proceedings on behalf of an employee or multiple employees (or an employee can commence proceedings in his or her own name) seeking penalties and orders for back payment for a failure by an employer to comply with a contractual obligation.

15. Further, these proceedings can be brought before a court that ordinarily deals with employment and industrial matters. If only penalties are sought they can include "an eligible State or Territory Court" as defined by the FW Act. Where orders for compensation are also sought then the proceedings need to be brought before a Federal Court or Federal Circuit Court: see s*545*(2).

16. Where an employer fails to make a contractually due payment to a number of employees then there is the real likelihood that each failure to pay amounts to a separate breach, each with a maximum penalty of $51,000. This seems to follow from the Full Court decision in *QR Ltd v CEPU*[11] which held that s*557* (which deems multiple contraventions arising out of a single course of conduct to be a single contravention) does not apply to consolidate breaches of the same term in different industrial instruments. That is not to say that a court would not take into account that a failure by an employer to pay in accordance with a particular clause contained in multiple contracts was akin to a single contravention, applying the principle of totality.

Conclusion

17. There are many employees in Australia who, whilst covered by an industrial instrument such as a Modern Award, or who are Award free, have conditions of employment set by a contract of employment. The significance of the *Betezy* and *Wollongong Coal* decisions is that unions, or employees on their own behalf, appear to have a readily available remedy to pursue underpayments that arise from contracts of employment with national system employers which allows claims to be pursued in a manner not relevantly different to an underpayment under an award or enterprise agreement. In particular:

    a. A union can be an applicant on behalf of the employee(s);

    b. Penalties can be sought for the underpayment;

    c. Orders can be sought for the moneys due to be paid plus interest;

    d. Orders can be made against accessories (which is useful if the employer is insolvent);

[11] (2010) 204 IR 142 at [43]-[48].

e. Such claims can be sought before Courts which specialise in industrial and employment matters; and

f. Such claims are brought in a 'no costs' jurisdiction (where costs cannot be awarded other than as permitted by s570 of the FW Act).

A note of caution

18. At this early stage in the development of this jurisprudence caution should be taken. While not preferred by Buchanan J, there are arguments in favour of reading s323 in a narrow fashion, restricting it to a traditional 'Truck Act' type provision, and it is possible an appeal court may prefer that narrow construction. Accordingly, it is recommended that until the jurisdiction is confirmed a more cautious approach be taken of commencing such proceedings in the name of an employee and have that employee claim in the alternative the amounts due under their contract of employment under common law.

Sections 542 and 543 – Entitlements under contract

19. Sections 542 and 543 of the FW Act permit employees employed by a 'national system employer' who have an entitlement under a contract to seek to enforce that contractual term as if it were a statutory entitlement under the FW Act. This provides a mechanism in addition to s323 to enforce both monetary and non-monetary contractual entitlements provided they fall within the definition of "a safety net contractual entitlement".

20. Sections 542 and 543 are as follows:

> 542 Entitlements under contracts
>
> (1) For the purposes of this Part, a safety net contractual entitlement of a national system employer or a national system employee, as in force from time to time, also has effect as an entitlement of the employer or employee under this Act.
>
> (2) The entitlement has effect under this Act subject to any modifications, by a law of the Commonwealth (including this Act or a fair work instrument), a State or a Territory, of the safety net contractual entitlement.
>
> 543 Applications for orders in relation to statutory entitlements derived from contracts
>
> A national system employer or a national system employee may apply to the Federal Court or the Federal Circuit Court to enforce an entitlement of the employer or employee arising under subsection 542(1).

21. Key to their application is the expression a "safety net contractual entitlement". That expression is defined in s12 of the FW Act as follows:

Safety net contractual entitlement means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:

(a) subsection 61(2) (which deals with the National Employment Standards); or

(b) subsection 139(1) (which deals with modern awards).

22. To be a safety net contractual entitlement the entitlement under the contract need only "relate to" any of the subject matters described in subsections 61(2) and 139(1). They are in the following terms.

23. Subsection 61(2):

The minimum standards relate to the following matters:

(a) maximum weekly hours (Division 3);

(b) requests for flexible working arrangements (Division 4);

(c) parental leave and related entitlements (Division 5);

(d) annual leave (Division 6);

(e) personal/carer's leave and compassionate leave (Division 7);

(f) community service leave (Division 8);

(g) long service leave (Division 9);

(h) public holidays (Division 10);

(i) notice of termination and redundancy pay (Division 11);

(j) Fair Work Information Statement (Division 12).

24. Subsection 139(1):

A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

  (i) skill-based classifications and career structures; and

  (ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

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

  (ii) employees working on weekends or public holidays;

  (iii) shift workers;

(f) annualised wage arrangements that:

  (i) have regard to the patterns of work in an occupation, industry or enterprise; and

  (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

25. Whilst clearly not exhaustive, the broad subject matter set out in those subsections, particularly subsection 139(1), would capture most of the key terms of the usual contract of employment, including terms in respect of:

a. Remuneration including superannuation;

b. Working hours;

c. Leave; and

d. Dispute settlement.

26. Pursuant to s542 each of these contractual entitlements "has effect as an entitlement of the employer or employee under this Act". Section 543 enables the employee to apply to the Federal Court or Federal Circuit Court to enforce such an entitlement.

27. Like proceedings for contravention of s323 discussed above, this means that an employee can rely on a contractual entitlement to:

a. Bring proceedings before a Court with specialised knowledge of employment and industrial matters, namely the Federal Court or the Federal Circuit Court;

b. Bring proceedings which will be subject to the FW Act provisions in respect of costs, namely (subject to the exceptions in s570) each party will bear their own costs; and

c. Having brought proceedings within jurisdiction add to them further claims in the court's associated jurisdiction, which would include claims for breach of contract in respect of terms that are not themselves 'safety net contractual entitlments'.

28. There are, however, some important differences to proceedings brought under s323:

a. A failure to pay a safety net contractual entitlement is not a contravention of a civil remedy provision, and accordingly:

i. There is no capacity to seek penalties;

ii. It does not trigger the Court's broad powers in s545 to make "any order that the Court considers appropriate": the court's powers are limited to orders to enforce the contractual entitlements; and

iii. Orders cannot be made against accessories pursuant to s550.

b. Proceedings have to be brought by the employee, and cannot be brought by a union on behalf of an employee.

c. The proceedings cannot be brought in "an eligible State or Territory Court".

Part 3-1 – Employees are protected if they make complaints about their contract of employment

29. The Applicant in the *Betezy* proceedings had complained to the chief executive of her employer about a failure to pay her commission. She had said she would seek legal advice if she were not paid. Whilst it was contested, Jessup J was satisfied that the chief executive threatened the Applicant that if she took legal advice about her unpaid remuneration or commission she would be fired.[12] The Applicant relied on s340(1) of the FW Act which provides that a person must not take or threaten adverse action against another person because the other person has a workplace right or proposes to exercise a workplace right. Section 341 of the FW Act provides that a person has a workplace right if the person:

> Is able to make a complaint or enquiry. . . in relation to his or her employment.

30. In *Betezy* the Applicant alleged that she was able make a complaint or enquiry in relation to her employment, namely to obtain legal advice about her rights in relation to remuneration and commission. Jessup J noted that the workplace right would clearly extend to situations where an employee makes an enquiry or complaint to his or her employer. His Honour had to consider whether the provisions extend to a situation where an employee might make a complaint or enquiry to his or her solicitor. At [142] Jessup J said the following:

> In the present case, it was not the employer to whom the applicant proposed to make a complaint or inquiry: it was her solicitor. Indeed, she had been making complaints to her employer over an extended period. It was the inefficacy of those complaints, and the applicant's frustrations with the respondents' failure to address them, that led to her advising Mr Kay on 20 September 2011 that she proposed to seek legal advice. The question, therefore, is whether the seeking of legal advice falls within the connotation of a complaint or inquiry within the meaning of s341(1)(c)(ii). A significant innovation introduced by the FW Act was the imposition of an obligation upon a "national system employer" (such as each of the respondents was) to pay its employees amounts payable to them in relation to the performance of work in full at least monthly: s323(1) of the FW Act. Thus the legislation picks up, amongst other things, entitlements arising under contracts of employment and gives statutory consequences to an employer's failure to make good on them. In this respect, s323(1) is a civil remedy provision. There is – and there would have been at the time of the introduction of this provision – no reason to assume that the employees for whose

[12] At [138].

> benefit s323(1) was enacted would be confined to those in unionised sectors and occupations. Perhaps more than ever before, it must realistically be accepted that individual employees, without the benefit of union representation, will often need to seek their own advice and representation in relation to rights arising under federal industrial legislation.

31. Jessup J went on to state that he could think of no reason why the protection should not extend to an employee not represented by a union, stating:

> That such an employee should be able to have recourse to his or her solicitor, without the fear of repercussions in the nature of "adverse action" taken by the employer, would be well within the purposes of the section as they may be perceived in the legislative context to which I have referred.[13]

32. His Honour concluded that the Applicant's proposal that she would seek legal advice was a proposal to exercise a workplace right and as a consequence she was protected from any adverse action the employer might take because of that proposal.

Conclusion

33. The FW Act arms an employee, or a union representing employees, with a range of remedies and protections in respect of entitlements under a contract of employment.

34. Most powerful is s323 which, on the authority of *Betezy* and *Wollongong Coal*, when combined with s545, creates a right for an employee to bring proceedings seeking a penalty and orders for compensation when an employer fails to pay an amount due under the contract in full when payable.

35. In the alternative or as an additional claim many contractual entitlements can also be pursued in the Federal Court or Federal Circuit Court as a deemed entitlement under the FW Act pursuant to ss542 and 543.

36. An employee can make complaints about the failure to pay such entitlements and approach their solicitors to seek assistance in the knowledge that an employer would breach the Act if it took adverse action as a consequence.

INGMAR TAYLOR SC

STATE CHAMBERS
LEVEL 35, 52 MARTIN PLACE
SYDNEY NSW 2000

INGMAR.TAYLOR@STATECHAMBERS.NET

02 9223 1522

[13] At [143].