Federal Court of Australia

O’Brien v Caboolture Aero Club Inc [2024] FCA 392

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| File number(s): | QUD 2 of 2023 |
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| Judgment of: | **MEAGHER J** |
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| Date of judgment: | 18 April 2024 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to amend statement of claim – whether there is sufficient explanation for the delay – whether amendments are ‘hopeless’ and could not succeed – whether there is prejudice suffered by the respondents – whether issues arise out of the same substratum of facts – amendments required to determine the real questions in controversy – sufficient explanation for delay – amendments allowed  **PRACTICE AND PROCEDURE –** application for Court-ordered mediation – lack of consent to attend mediation – where significant costs have been incurred – proceedings referred to mediation |
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| Legislation: | *Disability Discrimination Act 1992* (Cth)  *Evidence Act 1995* (Cth) s131  *Fair Work Act 2009* (Cth) ss 45, 341(1)(a), 342, 351, 352, 361(1), 453, 542, 570(2)(a)  *Federal Court Act 1976* (Cth) ss 33ZF, 37M, 37N  *Workers Compensation and Rehabilitation Act 2003* (Cth)  *Federal Court Rules 2011* (Cth) rr 16.53, 53A  *Anti-Discrimination Act 1991* (Qld) s14  *Fair Work Bill 2008*  *Airline Operations – Ground Staff Award 2020* s32  *Miscellaneous Award**2020* s54 |
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| Cases cited: | *Aitken v Virgin Australia Airlines* [2013] FCCA 981  *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175  *Barnett v Territory Insurance Office* (2011) 196 FCR 116  *Braun v St Vincent’s Private Hospital Northside Ltd* [2023] FCA 166  *Caruso Australia Pty Ltd v Portec Australia Pty Ltd* [1986] FCA 40  *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261  *Civil Air Operations Officers Association of Australia v Air Services Australia (No. 2)* [2021] FCA 993  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No. 2)* [2010] FCA 652  *Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 3)* [2022] FCA 1345  *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118  *Fair Work Ombudsman v Foot and Thai Massage Pty Ltd (In liquidation) (No 4)* [2021] FCA 1242  G*hobrial v Spectrum Migrant Resources Centre* [2022] FedCFamC2G 358  *Granitgard Pty Ltd v Termicide Pest Control Pty Ltd* [2008] FCA 865  *Hanna v Australian Securities and Investment Commission* [2011] FCA 1077  *Martens v Indigenous Land Corporation* [2017] FCCA 896  *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66  *Reilly* *v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502  *Roohizadegan v TechnologyOne Ltd (No 2)* [2020] FCA 1407  *Shannon v Lee Chun* (1912) 15 CLR 257  *Skinner v Commonwealth of Australia* [2012] FCA 1194  *SPI Spirits (Cyprus) Ltd v Diageo Australia Ltd (No 4)* [2007] FCA 1035  *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2  *Tamaya Resources Ltd (in Liq) v Deloitte Touche Tohmatsu (a Firm)* [2015] FCA 1098  *University of Sydney v ObjectiVision Pty Ltd* [2016] FCA 1199 |
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| Division: | Fair Work Division |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 68 |
|  |  |
| Date of hearing: | 7 February 2024 |
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| Counsel for the Applicant: | C Mossman |
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| Solicitor for the Applicant: | Wotton & Kearney Lawyers |
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| Counsel for the Respondents: | TA Spence |
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| Solicitor for the Respondents: | Farren Mcrae Workplace Lawyers and Consultants |

ORDERS

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|  | | QUD 2 of 2023 |
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| BETWEEN: | KEVIN O'BRIEN  Applicant | |
| AND: | CABOOLTURE AERO CLUB INC  First Respondent  PETER COBURN  Second Respondent | |

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| order made by: | MEAGHER J |
| DATE OF ORDER: | 18 APRIL 2024 |

THE COURT ORDERS THAT:

Interlocutory Application

1. The applicant has leave to amend the statement of claim to allege contraventions of:
   1. section 45 of the *Fair Work Act 2009* (Cth) and clause 27 of the Miscellaneous Award; and
   2. section 14 of the *Anti-Discrimination Act 1991* (Qld),

in substantially the same form as the form which is set out in Annexure CMH-2 to the affidavit of Chris Mossman affirmed on 19 December 2023 (**Draft Amended Statement of Claim**).

1. The applicant has leave to amend the statement of claim in the form of the Draft Amended Statement of Claim in relation to paragraphs 12A, 12B, 12C and 17A of the Draft Amended Statement of Claim.
2. By 4:00 pm AEST on 26 April 2024, the applicant file and serve the amended statement of claim.
3. By 4:00 pm AEST on 10 May 2024, the respondents file and serve an amended defence and any affidavit evidence.
4. Pursuant to s 53A of the *Federal Court of Australia Act 1976* (Cth), the proceedings be referred to mediation by a Registrar of the Court.
5. The mediation shall be conducted by 17 May 2024. Representatives of each party with full authority to settle these proceedings are required to attend the mediation.
6. The mediator is to report the result of the mediation to the Court following the end of the mediation.
7. The costs of the applicant’s interlocutory application be reserved.

**Trial**

1. Orders 4 and 6 to 14 of the Orders made on 1 November 2023 be vacated.
2. Any affidavit, or part thereof, which has been filed and served in accordance with the Court’s previous Orders in this matter and which has not been the subject of a notice of the kind referred to in Order 1 of the Orders made on 1 November 2023 will, subject to any order of the Court, be admitted into evidence (subject to any objection made under the *Evidence Act 1995* (Cth)) provided that the relevant witness is made available for cross-examination, if required by notice in accordance with Order 15 below.
3. Not later than 4:00pm AEST 15 business days before the hearing, the Applicant is to file and serve on the Respondents an outline of opening submissions.
4. Not later than 4.00pm AEST 10 business days before the hearing, the Respondents are to file and serve on the Applicant an outline of opening submissions.
5. Not later than 4.00pm AEST 5 business days before the hearing, the Applicant is to file and serve on the Respondents an outline of any submissions in reply.
6. Outlines of submissions are not to exceed 10 pages in length (5 pages for submissions in reply), including any annexures, and be easily legible using a font size of at least 12 points and one and a half line spacing throughout, including in any footnotes and annexures. Italics or underlining must be used for legislation and case citations and boldface or italics may be used for occasional emphasis.
7. Not later than 4:00pm AEST 5 business days before the hearing, the parties file and serve lists of those witnesses they require to be available for cross examination.
8. Not later than 4.00pm AEST 3 business days before the hearing, the Applicant file and serve an eBook of authorities, in accordance with eBooks Practice Note, being a jointly consolidated version of all of the authorities, legislation and explanatory and other material proposed to be relied on at the hearing by all parties.
9. Not later than 4:00pm AEST 3 business days before the hearing, the Applicant file and serve a Court eBook, in accordance with eBooks Practice Note.
10. There be liberty to apply on three days’ notice.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

# MEAGHER J

# introduction

1. By an interlocutory application filed on 19 December 2023, the applicant sought leave to file and serve an amended statement of claim. The applicant also sought an order for the matter to be referred to a mediator for resolution.
2. For the reasons that follow, the application is allowed.

# background

1. It is convenient to briefly set out the background to the substantive proceeding.
2. The applicant, Mr O’Brien was employed by the first respondent, the Caboolture Aero Club Inc, in the role of Aerodrome Reporting Officer and Airfield Maintenance Supervisor from 8 March 2021 until 14 November 2022. The second respondent, Mr Coburn, is the President of the Management Committee of the first respondent.
3. On 11 August 2022, the applicant took personal leave due to illness. The applicant was diagnosed with a psychological injury which he claims is a result of bullying and harassment by the second respondent. On the same day, the applicant made an application for worker's compensation pursuant to the *Workers Compensation and Rehabilitation Act 2003* (Cth). The basis of the application related to complaints about workplace bullying and harassment.
4. From October 2022 until his termination on 14 November 2022, the applicant remained absent from work.
5. On 5 October 2022, during the time when the applicant was on leave from work, the second respondent received a report entitled ‘*Cost Analysis Comparing employee and equipment costs to outsourced contractor services*’ (**the Report**). The Report included:

This report aims to analyse the current airfield operating expenses of Caboolture Aero Club Inc (the club) in its current form in comparison to outsourcing services to third-party private contractors.

…

Whilst it appears that moving to contracted services alone financially benefit the club, we recommend that further analysis be undertaken due to the timeframe with which this report was compiled for the October 2022 meeting. This report has not included any benefit that the club may receive from the sale of the equipment listed above or any possibility of generating an income stream from renting space in the shed.

This report should be considered indicative of the outcomes and not a statement of fact.

1. On 31 October 2022, the second respondent, on behalf of the first respondent, provided to the applicant a notice which terminated his employment taking effect on 14 November 2022 “by reason of redundancy.”
2. The applicant alleges the first respondent took adverse action against him pursuant to section 342 of the *Fair Work Act 2009* (Cth) (**FWA**). The applicant alleges his employment was terminated because he exercised a workplace right:
   1. to take personal leave;
   2. to make a claim for workers compensation; and
   3. by making a complaint about bullying and harassment in the workplace.
3. Further, the applicant pleaded that the first respondent breached s 351 of the FWA by terminating the applicant's employment due to his psychological injury and section 352 of the FWA by terminating his employment as he was temporarily absent from work.
4. The applicant also pleaded that the first respondent failed to comply with its obligations under clause 32 of the *Airline Operations – Ground Staff Award 2020* (**Airline Award**) which provides for consultation requirements regarding major workplace change.
5. As well, the applicant pleaded that the first respondent breached clause 21 of the employment contract by not providing the applicant with four week’s written notice.

# interlocutory application

1. The applicant sought leave of this Court to make amendments to his statement of claim. The proposed amendments can be categorised as follows:
   1. that the applicant’s employment was covered by the *Miscellaneous Award 2020* (**MA Amendments**);
   2. that the applicant had the benefit of further workplace rights and the first respondent dismissed his employment because he had the benefit of those further workplace rights (**FWR Amendments**); and
   3. that the first respondent breached provisions of the *Anti-Discrimination Act 1991* (Qld)(**ADA Amendments**).
2. The hearing of the interlocutory application took place on 7 February 2024. The applicant read the interlocutory application, written submissions filed on 5 February 2024 and the affidavit of Chris Mossman affirmed on 19 December 2023, which annexed the draft amended statement of claim and the respondents relied upon the affidavit of Kelly Ann Cooper affirmed on 4 February 2024 and their written submissions filed on 5 February 2024.
3. At the outset of the hearing, counsel for the applicant raised an objection as to the admissibility of certain evidence which was relied upon in the respondent’s submissions. The relevant evidence is contained at paragraph 5 of Ms Coopers, which also exhibited ‘without prejudice’ correspondence. The correspondence appears to relate to the conduct of a conciliation conference. The applicant submitted that pursuant to s 131 of the *Evidence Act 1995* (Cth), such communication could not be adduced.
4. The respondents submitted that the prejudice in that correspondence belonged to the respondents and that it waived the privilege. The applicant’s submission, with which I agreed, was that both parties were required to consent to the waiver of privilege for the evidence to be adduced. Accordingly, I upheld the objection.

## MA Amendments

1. The MA Amendments allege that if the Airline Award does not apply, in the alternative, the applicant’s employment was covered by the ***Miscellaneous Award*** *2020*. The applicant submitted that the reason for this amendment is to respond to the respondent’s denial of the applicability of the Airline Award, despite it being the applicable award nominated under the employment contract.
2. This amendment is proposed as it relates to the alleged contravention of consultation clauses contained in both the Miscellaneous Award and the Airline Award. In that regard, paragraphs 22A to 22D of the proposed amended statement of claim is in the following terms:

22A. In the alternative pursuant to Clause 27 of the Miscellaneous Award the First Respondent prior to the Applicant’s termination for redundancy was required to:

a. give notice of the changes to the Applicant; and

b. discuss with the Applicant and his representative (if any):

i. the introduction of the changes;

ii. their likely effect on the Applicant;

iii. the measures to avoid or reduce the adverse effects or of the changes on the Applicant; and

iv. commence discussions with the Applicant as soon as practicable after that decision had been made.

22B. Furthermore, the First Respondent was also required to give the Applicant in writing all relevant information about the changes including:

c. [sic] their nature;

d. [sic] their expected effect on the Applicant; and

e. [sic] any other matters likely to affect the Applicant.

22C. In the premise by virtue of its conduct pleaded in paragraph 13 hereof the First Respondent did not comply with any of its obligations in Clause 27 of the Award.

22D. In the premise the Applicant has contravened Clause 27 of the Award and Section 45 of the FW Act.

## FWR Amendments

1. The FWR Amendments plead that the first respondent terminated the applicant’s employment because he had the benefit of further workplace rights – namely safety net contractual entitlements. The proposed amendments are in these terms:

**Further Workplace Rights**

12A. Pursuant to the terms of the Employment Contract the Applicant was entitled to:

1. Be paid for each hour of work at a rate of $31.25 per hour plus superannuation;
2. Entitled to accrue and take personal or careers [sic] leave of 10 days per year; and
3. Entitled to accrue and take long service leave in accordance with the relevant State legislation being the *Industrial Relations Act 1999* (Qld).

12B. Each of the matters pleaded in paragraph 12A hereof were “safety net contractual entitlements” within the meaning of Section 12 of the FW Act.

12C. In the premise, pursuant to Section 542 of the FW Act each of the Further Workplace Rights were a workplace right within the meaning of Section 341(1)(a) of the FW Act.

…

17A. Further or in the alternative the Frist Respondent contravened Section 340(1)(a) of the FW Act by terminating the Applicant’s employment because he had the benefit of the Further Workplace Rights.

**Particulars**

ii. In coming to its decision to dismiss the Applicant the First Respondent relied on a Report from A Head for Numbers Costs Analysis dated 5 October 2022.

iii. The Report presumes that the Applicant will take all of his personal or careers [sic] leave entitlement.

iv. The Report presumes that the Applicant will take all of his long service leave entitlements.

v. The assumptions made in made in [sic] relation to the taking of such leave form part of the conclusions in the Report as to why it would be less expensive to use a contractor then [sic] the Applicant.

vi. Further or in the alternative the Report concludes that it was less expensive to use a contractor because of each of the Applicant’s benefits pleaded in paragraphs 12A hereof.

## ADA Amendments

1. The AD Act Amendments purport to plead that the first respondent contravened provisions of the *Anti-Discrimination Act 1991* (Qld) (**AD Act**) by not offering the applicant the opportunity to be engaged as a contractor on the basis of on the applicant’s impairment.

## Mediation

1. In his interlocutory application, the applicant also sought an order for the proceedings to be referred to mediation.

# legal principles

1. Section 37M of the *Federal Court Act 1976* (Cth) provides:

**37M The overarching purpose of civil practice and procedure provisions**

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Court;

(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(c) the efficient disposal of the Court’s overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The ***civil practice and procedure provisions*** are the following, so far as they apply in relation to civil proceedings:

(a) the Rules of Court made under this Act;

(b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

1. Further, section 37N of the Act relevantly provides:

**37N Parties to act consistently with the overarching purpose**

(1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

1. Section 33ZF of the Act provides the Court with the broad power to make any order which is appropriate or necessary for the administration of justice.
2. Rule 16.53 of the *Federal Court Rules 2011* (Cth) provides the mechanism for a party to amend a pleading:

**16.53 Application for leave to amend**

(1) Unless rule 16.51 applies, a party must apply for the leave of the Court to amend a pleading.

(2) A party may apply under subrule (1) for leave to amend a pleading to add or substitute a new claim for relief, or a new foundation in law for a claim for relief that arises out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the party, even if the application is made after the end of any relevant period of limitation applying at the date the proceeding was started.

(3) A party must not apply under subrule (1) for leave to amend a pleading to add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises, in whole or in part, out of facts or matters that have occurred or arisen since the start of the proceeding if the application would be made after the end of any relevant period of limitation applying at the date the proceeding was started.

1. The applicable principles are well-established and not in dispute between the parties. Notwithstanding that the Court’s discretion to exercise its power to permit amendments is broad, the Court ought exercise its discretion to facilitate the just resolution of disputes pursuant to s 37M of the Act; ***Cement Australia*** *Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261; [2010] FCAFC 101 at [43]; *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2; (2016) 332 ALR 199 at [122] – [124].
2. The party seeking leave to amend bears the onus of persuading the Court that leave should be granted; *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118 at [17].
3. In ***Aon*** *Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, the High Court set out various factors which ought to be considered in an amendment application. Such principles, along with those enunciated in *Cement Australia*, were helpfully summarised by Gleeson J in *Tamaya Resources Ltd (in Liq) v Deloitte Touche Tohmatsu (a Firm)* [2015] FCA 1098 at [127]-[128]:

The principles articulated by the High Court in *Aon* apply to matters in this court: *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 101; (2010) 187 FCR 261 (“*Cement Australia*”) at [43]. Relevant matters the Court is to consider include:

(1) The nature and importance of the amendment to the party applying for it: *Aon* at [102];

(2) The extent of the delay and the costs associated with the amendment: *Aon* at [102];

(3) The prejudice that might be assumed to follow from the amendment, and that which is shown: *Aon* at [5], [100] and [102];

(4) The explanation for any delay in applying for that leave: *Aon* at [108]; and

(5) The parties’ choices to date in the litigation and the consequences of those choices: *Aon* at [112] and *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75 (“*Luck*”) at [44];

(6) The detriment to other litigants in the court: *Aon* at [93], [95] and [114] and *Luck* at [44]; and

(7) Potential loss of public confidence in the legal system which can arise where a court is seen to accede to applications made without adequate explanation or justification: *Aon* at [5], [24] and [30].

The weight to be given to the considerations identified in *Aon*, individually and in combination, and the outcome of the balancing process, may vary depending on the facts in the individual case: *Cement Australia* at [51].

1. Further, in *Granitgard Pty Ltd v Termicide Pest Control Pty Ltd* [2008] FCA 865 at [23], Collier J set out the following principles in relation to the granting of leave to amend pleadings:

Conveniently, general principles relevant to the Court granting leave to amend pleadings were summarised recently in the judgment of Edmonds J in *SPI Spirits (Cyprus) Ltd v Diageo Australia Ltd (No 4)* [2007] FCA 1035. In relation to this issue I adopt the following statements of his Honour:

“**[14]** The starting point is that all of such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided: *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146; *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2003] FCA 1537. Although O 13 r 2 of the Federal Court Rules (‘the Rules’) confers a discretion on the Court as to whether to allow the amendments, it is well-established that an amendment will ordinarily be allowed provided it can be done without harm to the other party which cannot be compensated by an award of costs or an adjournment: *The Commonwealth v Verwayen* (1990) 170 CLR 394; *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128.

**[15]** The overriding concerns should be to ensure that all matters in issue upon which the parties seek adjudication are determined in the proceeding and to avoid a multiplicity of proceedings: *Caruso Australia Pty Ltd v Portec Australia Pty Ltd* [1986] FCA 40.

**[16]** Order 13 r 2(2) of the Rules makes explicit reference to this principle:

All necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings.

**[17]** The general approach is that where a party satisfies the Court that he or she generally desires to amend the pleadings so as to alter an existing claim or to introduce a new claim, leave should be granted unless the proposed amendment is so obviously futile that it would be struck out if it had appeared in the original pleading or would cause substantial injustice which cannot be compensated for in the manner indicated in [14] above: *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344 at 345.

**[18]** It is recognised that the allowance of an amendment before a trial begins (when there is time for a proper defence to be filed) stands in a very different position from amendment towards the end of a trial: *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220 per Lord Griffiths.”

(emphasis in original)

# consideration: APPLICATION FOR LEAVE TO FILE AMENDED STATEMENT OF CLAIM

## Nature and importance of the proposed amendments

### MA Amendments

1. The applicant argued that the reason that the Airline Award is the award which is pleaded in the statement of claim is that it is the award which appears on the applicant’s employment contract. The applicant submitted that this amendment is proposed in response to the defence filed on 3 April 2023 wherein the respondents deny the allegation that the Airline Award applied to the applicant’s employment.
2. The applicant made submissions as to why the Miscellaneous Award would apply to the applicant’s employment. He also made submissions as to the importance attached to consultation provisions: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591 at [43]-[44] and [145]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No. 2)* [2010] FCA 652 at [66]; G*hobrial v Spectrum Migrant Resources Centre* [2022] FedCFamC2G 358 at [25]; *Civil Air Operations Officers Association of Australia v Air Services Australia (No. 2)* [2021] FCA 993. The applicant submitted that the amendments would allow the applicant to argue that the first respondent did not comply with the consultation provisions prescribed by the Miscellaneous Award if the Airline Award is found not to be applicable to the applicant’s employment. In that regard, he submitted that the consultation provisions were the same in the Airline Award and the Miscellaneous Award, and therefore the factual basis upon which the case will proceed in this regard will not change.
3. The respondents submitted that these amendments are ambiguous and liable to being struck out as the applicant has failed to plead the facts necessary to establish that the Miscellaneous Award would apply to the applicant. In support of that proposition the respondents relied on the statements of O’Bryan J in *Reilly* *v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502 at [18] as follows:

The Court will not grant leave to amend a pleading under r 16.53 of the FC Rules if the amendment would be futile in the sense that it discloses no reasonable cause of action and is therefore liable to be struck out if it had appeared in the original pleading: *Allstate Life Insurance Company v Australia and New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 36

1. In response, the applicant submitted that such an argument did not make sense as the respondents had pleaded to paragraph 5 of the statement of claim in their defence, which is in identical form to the proposed amendment. The applicant also submitted that such deficiencies can be remedied by the Court granting leave for the applicant to file an amended statement of claim which addresses such deficiencies. In that regard, the applicant relied on ***Braun*** *v St Vincent’s Private Hospital Northside Ltd* [2023] FCA 166 wherein analogous orders were made.
2. I accept the applicant’s submissions in respect of the importance of the proposed amendments. The MA amendments should be allowed. This is a situation not dissimilar to that in *Fair Work Ombudsman v Foot and Thai Massage Pty Ltd (In liquidation) (No 4)* [2021] FCA 1242. In that case, an interlocutory application to amend the statement of claim in relation to the applicable award was filed after the hearing. Katzmann J allowed the amendment observing at [315] –[323]:

As the Full Court (Keane CJ, Gilmour and Logan JJ) observed in *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 at [51], *Aon* is “not a one size fits all case”. The weight to be given to the relevant considerations, both individually and in combination, and the outcome of the balancing process involved in the exercise of the discretion may vary according to the facts of the particular case. In contrasting the circumstances of that case with *Aon*, the Full Court went on to point out at [52] that in *Aon* the claim introduced by the amendment had not previously been raised because of a deliberate tactical decision on the part of the ANU (*Aon* at [4] and [24]). Given the delay in proposing the amendment, an explanation was required and none was given (*Aon* at [106]).

This case is very different.

Unlike *Aon* the Ombudsman is not seeking leave to add a substantial new claim. Unlike the decision taken by the ANU in *Aon*, the Ombudsman's decision to plead the Support Services classification was not a tactical decision. Further, unlike the ANU in *Aon*, the Ombudsman provided an explanation to the Court. Until the new evidence emerged, the Ombudsman believed it to be the right classification. When the new information emerged, she believed she might have been mistaken. It is true that she could have obtained the information in exhibit 8 from the Department of Home Affairs herself, if not before the proceeding started, at least by subpoena once it had. That may have been enough to plead the HP Level 1 classification. But her omission to do so is at most an oversight. Any prejudice to Mr Elvin is largely, if not entirely, of his own making.

Third, although the timing of the application is unfortunate, and the application for leave to amend was made very late, there was minimal delay in making it once the Ombudsman realised her potential error.

Fourth, the interests of the Massage Therapists should also be considered. They were not party to the Ombudsman's conduct. If the HP Level 1 classification is the correct classification, there is no good reason why they should be penalised for error on the Ombudsman's part.

Fifth, this case should be determined on its merits.

In *Leotta v Public Transport Commission* (NSW) (1976) 9 ALR 437 at 446; 50 ALJR 666 at 668, Stephen, Mason and Jacobs JJ said:

“If in the cause of action upon which the plaintiff sued there had emerged at the conclusion of the evidence facts which, if accepted, established that cause of action, then it was the duty of the trial judge to leave the issue of negligence to the jury. The pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence which had emerged.”

In *Banque Commerciale SA (in liq) v Akhil Holdings Limited* (1990) 169 CLR 279 at 296-7 Dawson J remarked that “modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon [a different basis] … cases are determined on the evidence, not the pleadings”. That remark was approved by five justices of the High Court in *Vale v Sutherland* (2009) 237 CLR 638 at [41].

As the Full Court observed in *Cement Australia* at [68], there is nothing in *Aon* or in the FCA Act to suggest that it is irrelevant for the Court to take into account in the exercise of its discretion the desirability that a case be decided on its merits, so as to preserve public confidence in the administration of justice.

1. Consistent with *Braun*, I am also satisfied that the applicant should have the opportunity to file and serve an amended statement of claim, including which addresses the concerns raised by the respondents.

### FWR Amendments

1. The applicant submitted that the FWR amendments, in paragraphs 12A to 12C, do not introduce a new cause of action as they only provide for additional workplace rights upon which adverse action was taken against him.
2. The respondents argued that the amendments are hopeless and unable to succeed. They contended that safety net contractual entitlements are not workplace rights pursuant to s 341(1)(a) of the FWA and that s 542 is the mechanism by which the applicant can make an application to enforce such entitlements. In support of this, the respondents referred to the Explanatory Memorandum of the Fair Work Bill 2008 which states that the purpose of s 542 of the FWA is to, “*provide a simple mechanism for national system employees and employers to enforce safety net contractual entitlements in a federal court*”. The respondents also noted that the applicant does not allege that an application pursuant to s 453 of the FWA has been made and, therefore, the applicant has not exercised any workplace rights.
3. The applicant’s oral submissions included that he had an arguable case that the safety net contractual entitlements were workplace rights. In that respect, he referred to *Martens v Indigenous Land Corporation* [2017] FCCA 896. At [25], Judge Jarrett concluded:

In my view, Mr Martens had an entitlement under the Fair Work Act (a workplace law) to apply to the Federal Court or this Court to enforce an entitlement that arose under s 542(1) of the Act. That entitlement - a *safety net contractual entitlement* - arose not from his contract of employment, although the existence of a contractual term about it was a necessary precondition to the statutory entitlement, but from the relevant workplace law itself - s 543 of the Fair Work Act.

1. The applicant also referred to ***Aitken*** *v Virgin Australia Airlines* (2013) 277 FLR 156;[2013] FCCA 981 and ***Roohizadegan*** *v TechnologyOne Ltd (No 2)* [2020] FCA 1407 as cases in which safety net contractual entitlements were considered workplace rights. The applicant did not refer to any particular passages in those cases. However, it appears that the applicant may have been referring to [57] – [62] of *Roohizadegan*, wherein Kerr J stated:

Having regard to the terms of Mr Roohizadegan's contract and those policies, I am satisfied Mr Roohizadegan had the entitlement upon which he relies. My conclusion in that regard is consistent with the reasoning of Dodds-Streeton J in *Shea v TRUenergy Pty Ltd (No 6)* [2014] FCA 271 at [640].

I am satisfied for those reasons that Mr Roohizadegan possessed and was capable of exercising a relevant “workplace right”.

He was accordingly protected by s 341(1)(c)(ii) against adverse action being taken against him for the reason that he had made a complaint in relation to his employment.

The same applies with respect to any complaint Mr Roohizadegan made in good faith regarding his contractual entitlements. In that regard I respectfully adopt the reasoning of Rangiah and Charlesworth JJ in *PIA Mortgage Services Pty Ltd v King (2020) 274 FCR 225; PIA Mortgage Services Pty Ltd v King 292 IR 317* at [19]-[20]:

“Under the general law, an employee has a right to sue his or her employer for an alleged breach of the contract of employment. A suit may be regarded as the ultimate form of complaint. Accordingly, in our opinion, an employee is ‘able to make a complaint’ about his or her employer's alleged breach of the contract of employment. That ability is ‘underpinned by’ (to use Dodds-Streeton J's expression in Shea) the right to sue, and extends to making a verbal or written complaint to the employer about an alleged breach of the contract.

Further, an employee who alleges that his or her employer has contravened a statutory provision relating to the employment is ‘able to make a complaint’ within s 341(1)(c)(ii) of the FW Act. That right or entitlement derives from the statutory provision alleged to have been contravened. The ability encompasses making a complaint to the employer or an appropriate authority about the alleged contravention, whether or not the statute directly provides a right to sue or make a complaint.”

Again, I do not apprehend the Respondents to take issue with that proposition.

I further take the Respondents to accept that, to the extent that Mr Roohizadegan did exercise a workplace right by complaining inter-alia about his being bullied by one or more other employees of TechnologyOne or about his safety net contractual entitlements, the presumption provided for by s 361(1) of the Fair Work Act applies in these proceedings. …

1. The respondents denied that the respondent’s cases stood for that position. In that regard, the respondents referred to ***Barnett*** *v Territory Insurance Office* (2011) 196 FCR 116 wherein Mansfield J stated at [21] – [23]:

The applicant's contention in this case is a straightforward and accessible one. He says that the contract itself is recognised by the FW Act because the FW Act recognises that some employment relationships will continue to be governed by the terms of the contract itself, subject to their terms being suppressed or overridden by applicable provisions of the FW Act, such as the National Employment Standards (NES) prescribed by ss 43 and 61. Section 12 includes a definition of an “award/agreement free employee” as someone to whom neither a “modern award” nor an “enterprise agreement” applies. Section 43 moreover clearly recognises that there will be employees whose employment is covered by a “fairwork instrument” as defined in s 12, that is by a modern award, an enterprise agreement, a workplace determination or an FWA order. Each of those types of instrument will be instruments made under the FW Act, so as to be “workplace instruments”. The FW Act also recognises that there will be employees whose employment is not covered by such an instrument. In addition, and as already mentioned above, s 382 dealing with unfair dismissal creates additional rights which will apply to a person not covered by such an instrument made under the FW Act, including a person whose employment is covered simply by a contract of employment, provided the remuneration package does not exceed the “high income threshold”.

In the sense of recognition by acknowledging the existence of, and treating as valid, the terms of a contract of employment, subject to the operation of the FW Act, it may fairly be said that the FW Act recognises the contract of employment. This is the broad interpretation of the first limb of the definition of “workplace instrument” as favoured by the applicant. Such a proposition also, it is argued, should be accepted because it is consistent with the objects of the FW Act as expressed in s 3 and as explained in the Minister's Second Reading Speech on the Fair Work Bill 2008 (Cth) (House of Representatives, *Debates*, 25 November 2008 at 11193).

However, in my judgment, the concept of recognition in the definition of “workplace instrument” does not have that expanded meaning. I do not think that such a meaning can properly be derived from the context and background to that expression, or having regard to other considerations to which I refer below.

1. The respondents also referred to *Construction, Forestry, Maritime, Mining and Energy Union v BM Alliance Coal Operations Pty Ltd (No 3)* [2022] FCA 1345 wherein Collier J referred to *Barnett* and summarised its conclusions at [40]. In particular, her Honour noted that Mansfield J concluded that it is “unlikely that recognition by a “workplace law” was intended to extent to the contract of employment itself” and that the “Fair Work Act did not enliven the contractual rights of the parties”.
2. This issue does not therefore appear to be settled so as to render the proposed amendments futile or hopeless. There is a clear controversy between the parties. The applicant argued that the FWR amendments, in paragraphs 12A to 12C, do not introduce a new cause of action as the amendments merely allege further workplace rights for which the first respondent terminated the applicant’s employment. Accordingly, the amendments should be allowed.

### AD Act Amendments

1. The applicant acknowledged that he is now out of time to file a complaint in the Queensland Human Rights Commission (**QHRC**). However, he claimed that he would still be entitled to initiate proceedings in this Court or the Federal Circuit Court on the basis of breaches of the *Disability Discrimination Act 1992* (Cth). Alternatively, he raised the possibility of applying to the Australian Human Rights Commission, but submitted that the delay in obtaining mediation dates in that forum and then possibly being back before either of the Courts referred to leads to the likelihood of other litigation occurring arising out of the same substratum of facts with all the associated cost and inefficiency. The applicant relied on *Braun* and contended that the proposed amendments are based on the evidence already filed. To that end, the applicant submitted that the proposed amendments rely upon the same impairment as has already been pleaded in relation to the dismissal of employment. He argued that the decision to terminate the applicant’s employment is related to the decision to appoint a contractor, which forms the basis of the proposed amendment. Therefore, he submitted, the proposed amendments arise from the same substratum of facts.
2. The respondents submitted that the proposed amendments do not arise out of the same, or substantially the same, facts as those which are pleaded in the statement of claim. The respondents therefore argued that the amendments are ambiguous, ‘hopeless’ and could not succeed. The respondents also contended that the proposed amendments are unparticularised.
3. I am satisfied that the proposed amendments do arise out of the same, or substantially the same, substratum of facts. Accordingly, as noted in *Braun* at [66], the proposed amendment forms part of the same matter. Further, having regard to the fact that the applicant could initiate proceedings in this Court or the Federal Circuit Court on the basis of the proposed amendments, I consider that the AD Act Amendments should be allowed to avoid a multiplicity of proceedings; *Caruso Australia Pty Ltd v Portec Australia Pty Ltd* [1986] FCA 40. While the respondents submitted that they would need to adduce further evidence to respond to this allegation, I am satisfied that, to ensure the controversies of the parties are determined, the amendment should be allowed.

## Extent of delay and prejudice to the respondents

1. The applicant submitted that the delay is confined to a period of four weeks. This period relates to the time between the date nominated at a case management hearing on 1 November 2023, during which the applicant foreshadowed his intention to file this application at about mid-November and the date upon which the interlocutory application was filed, which was a little over four weeks later.
2. This proceeding was initiated in December 2022 – over one year ago. As identified by the respondent, it has been over eight months since the close of the pleadings on 17 April 2023. However, the proposed amendments largely arise from the respondents’ very substantial affidavit material filed in September 2023. In light of that, it is difficult to see how the applicant could have made the application much earlier. The applicant submitted that the proposed amendments will not occasion the need for the filing of much in the way of further affidavit material on the part of the respondents as they arise from the evidence already put by the respondents going to why he was dismissed. Therefore, there should be no occasion for delay the applicant submitted, nor any added costs beyond the filing of an amended defence and, at most, brief affidavit evidence rebutting the relevant presumption pursuant to s 361 of the FWA.
3. Conversely, the respondents submitted that the proposed amendments, if allowed, would result in prejudice in the form of disproportionate costs to the respondent. For instance, in relation to the MA Amendments, the respondents contended that the applicant could have been identified and pleaded in the alternative when the proceeding was commenced. As identified by the respondents, the “Form F8 – General protections application involving dismissal” filed by the applicant in the Fair Work Commission alleged that the Miscellaneous Award is applicable. The respondents contend that this claim was seemingly abandoned when the applicant brought an application in this Court. Further, in relation to the AD Act Amendments, the respondents argued that it was a forensic decision made by the applicant to not file a complaint with the QHRC within the relevant time. Therefore, they argued that the respondents should not face prejudice as a result of forensic decisions made by the applicant. Such prejudice is anticipated on the basis of the filing of a further defence and affidavit material, as well as the costs thrown away with respect to the defence and affidavit material as currently filed.

## Adequacy of explanation for delay in applying for amendments

1. The respondents contended that the applicant has not explained the extent of the delay and, in that regard, relied upon *Aon* at [103] (per Gummow, Hayne, Crennan, Kiefel and Bell JJ):

“…Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court’s attention, so that they may be weighed against the effects of any delay and the objectives of the Rules. There can be no doubt that an explanation was required in this case.”

1. The respondents also noted that there had been no explanation provided with respect to the delay between the time when the applicant foreshadowed making an application to amend and the filing of it. As to the lack of explanation for the delay, the respondent referred to *University of Sydney v ObjectiVision Pty Ltd* [2016] FCA 1199*,* wherein it is stated at [63], referring to *Aon*, that the Court should consider the ‘*potential loss of public confidence in the legal system which can arise where a court is seen to accede to applications made without adequate explanation or justification*’.
2. In relation to the MA Amendments, the applicant submitted that the defence did not particularise why the Airline Award did not apply and, therefore, he did not become aware of why coverage of the Airline Award was being denied until being served with the respondents’ affidavit material dated 28 September 2023.
3. I accept the applicant’s explanation in relation to the MA Amendments.
4. In relation to the FWR Amendments, the applicant referred to the affidavit of Daniel Lee affirmed on 21 September 2023 which confirmed that when drafting the Report, he made assumptions that all long service and sick leave will be taken by the employee.
5. The applicant submitted, therefore, that the reason for the delay in applying for the amendments in this regard is that they could not have been made until receiving the affidavit material of the respondents.
6. As to the AD Act Amendments, the applicant referred to ***Braun*** where Rangiah J concluded at [80]:

I accept that no satisfactory explanation has been provided for Dr Braun’s considerable delay in making the present application. However, delay producing consequential prejudice is only one of the relevant factors. The claims based on federal and State legislation arise, as has been conceded, from the same substratum of facts. The State claims are unlikely to add much to the costs that would be incurred in the existing proceedings in any event. On the other hand, if leave to amend were refused and the proceedings in the QIRC and the Federal Court continued concurrently, the overall costs for the parties would be much greater and the resources of two courts would be occupied. In these circumstances, I propose to allow leave to amend.

1. The respondents submitted that *Braun* is distinguishable because, as there is no “*common substratum of facts*” in relation to the AD Act Amendments and the pleaded facts in the statement of claim, there does not exist a risk of concurrent proceedings as no complaint had been made pursuant to the AD Act and expiration of the limitation period was not in issue in that case.
2. The respondents’ submission must be rejected. As stated above at paragraph 45, I am satisfied that the issues do arise out of the same substratum of facts. Further, it is the case that a multiplicity of proceedings is a possibility here, which the Court should endeavour to avoid, irrespective of whether proceedings have or have not already been commenced in another Court or commission. Further, the fact that the limitation period was not in issue in *Braun* is not material. The applicant is still able to initiate proceedings in this Court, the Federal Circuit Court or the Australian Human Rights Commission.
3. Ultimately, as noted by *SPI Spirits (Cyprus) Ltd v Diageo Australia Ltd (No 4)* [2007] FCA 1035 at [14], the relevant overarching principle is that amendments should be allowed where they enable the determination of the real questions in controversy between the parties. Further, in this case, the proposed amendments are neither futile (*Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66; 255 ALR 508; [2009] FCA 320 at [21]–[23]) nor do they result in substantial injustice to the respondents that cannot be addressed with costs (*Shannon v Lee Chun* (1912) 15 CLR 257 at 260 – 261). Accordingly, the proposed amendments should be allowed to permit the real questions to be agitated.

# coNSIDERATION: MEDIATION

1. The applicant sought a further order for a Court-ordered mediation. Acknowledging that the parties had previously participated in a mediation by mutual consent, the applicant referred to the fact that the committee members who were alleged to have committed adverse action against the applicant have now left the committee, that the evidence upon which the parties rely has now been filed, and that significant legal costs, greater than the amount of the claim, had been since expended by the respondents.
2. The applicant referred to *Skinner v Commonwealth of Australia* [2012] FCA 1194 as an example of a case in which mediation had been ordered even when one party opposed it. The applicant also referred to ***Hanna*** *v Australian Securities and Investment Commission* [2011] FCA 1077 wherein McKerracher J adopted the observations of Rares J in a paper titled “Alternative Dispute Resolution in the Federal Court of Australia” at [13], as follows:

It has been the experience of the Court that parties' lack of consent to attend mediation is not an indication of the mediation's prospects of success. Many mediations successfully resolve disputes where the parties objected to the initial order referring proceedings in the Court to mediation. Bona fide participation once the parties are engaged in the mediation process is most important. Interestingly, the registrars' experience of the Court ordered mediations is that the parties nearly always become sincerely involved despite any initial opposition to the mediation. In general the attitude of the participants is that if parties and their representatives have to be there, they might as well use the opportunity.

On occasion a party will not want to be seen as suggesting mediation lest it be interpreted as a sign of weakness. Judicial coaxing or orders for mediation can allow those parties a way of joining the process without loss of face. If a party did participate in bad faith, a skilled mediator is likely to recognise this. Where he or she considered that such an approach by a recalcitrant party could not be remedied, the mediation would be terminated.

1. In support of this application, the applicant noted that the first respondent is a not-for-profit association which has already incurred substantial legal fees in circumstances where the matter is listed for a four-day trial on liability only and thereafter may require a hearing with respect to quantum. Indeed, the matter is listed for a five-day trial on matters of liability. Thus, it is likely that further significant costs will be incurred.
2. The respondents maintained that they opposed the mediation order due to the costs which will be incurred and given that previous attempts to settle the matter had been unsuccessful.
3. In the circumstances, I am satisfied that a mediation should be ordered and conducted by a Registrar of the Court. As noted by McKerracher J in *Hanna* at [15]:

There is a sound statistical and intuitive basis for confidence in the mediation skills of the professionally trained and practically experienced registrars in the Australian court system generally. Assuming a well-intentioned approach from legal advisors, as one would expect, the benefits of mediation, even if not resulting in a total settlement, should outweigh the cost and possible delay in the exercise.

1. While a mediation conducted on 30 June 2023 was unsuccessful, I am satisfied that there is utility in referring the matter to a further mediation before the parties are to expend the significant costs that are anticipated to arise from a five-day trial.

# costs

1. At the hearing, the respondents submitted that if the application is dismissed, the applicant ought to be ordered to pay the respondents’ costs as the applicant instituted the proceedings unreasonably: s 570(2)(a) of the FWA. In the alternative, the respondents submitted that if the application is granted, the Court should order that the applicant pay the respondents for costs thrown away on an indemnity basis.
2. The applicant sought that costs be reserved irrespective of whether he is successful in the application or not.
3. I consider that the proper order with respect to the costs of this application is that they should be reserved.

# conclusion

1. I am satisfied that the applicant should be granted leave to amend his statement of claim to allege contraventions of clause 27 of the Miscellaneous Award, s 45 of the FW Act, and s 14 of the *Anti-Discrimination Act 1991* (Qld). I note that there is no precise stipulation on the form of the amendments, other than with respect to the FWR Amendments. However, it is expected that the applicant is to take into account the comments in this judgment. Further, the matter is to be referred to a mediation before a Registrar of the Court. Costs should be reserved.

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| I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Meagher. |

Associate:

Dated: 18 April 2024