Murtagh v Corporation of the Roman Catholic Diocese of Toowoomba [2023] FCAFC 172

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| Appeal from: | *Independent Education Union of Australia v Corporation of the Roman Catholic Diocese of Toowoomba* [2023] FCA 64 |
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| File number: |  |
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| Judgment of: | **COLLIER, LOGAN AND MEAGHER JJ** |
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| Date of judgment: | 30 October 2023 |
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| Catchwords: | **INDUSTRIAL LAW** – Enterprise Agreements – appeal by two teachers (school employees) against decision to dismiss an application for back pay for increases to their pay and entitlements under an enterprise agreement commencing during their employment but coming into effect after their respective resignations – where employees sought declarations under s 545 of the *Fair Work Act 2009* (Cth) (FWA) that the employers contravened s 50 of the FWA by failing to pay them arrears of salary and related superannuation contributions for the period between the commencement date of the agreement and the date of their respective resignations – whether the construction of the respective commencement clauses, read with ss 51 – 54 of the FWA, means that an entitlement to arrears only applies to employees still employed when the agreement comes into operation – where under s 58(1) FWA only one enterprise agreement can apply to an employee at a particular time – where an enterprise agreement does not give a person an entitlement unless the agreement applies to the person s 51 (2) FWA - where an enterprise agreement may cover an employee even though it does not yet apply to that employee in the sense of imposing obligations on the employee and the employer *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593 considered – where an agreement term may have retrospective effect (eg a backdated wage increase) explanatory memorandum paragraph 196 of Bill to FWA considered – *Vendrig v Ausgrid Pty Ltd* [2021] FWCFB370, *Battye v John Holland Pty Ltd (JHPL) t/as Territoria Civil* [2019] FWCFB 8678 considered and *Pooley v Commissioner of Police* (2009) IR 273 distinguished  **Held**: employers under an obligation to pay back pay to “applicable employees” at the first pay period after the enterprise agreements came into effect – the appellants fell within the class of “applicable employees” – appeal allowed |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 3, 13, 14, 15, 42, 43, 50, 52, 53, 54, 57, 58, 172, 182, 186, 545, 546, 547, 562, 563  *Federal Court of Australia Act 1976* (Cth) s 21  *Judiciary Act 1903* (Cth) s 39B |
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| Cases cited: | *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593  *Australian Workers’ Union v TAD Pty Ltd T/A Tad Industrial* [2016] FWC 1794  *Battye v John Holland Pty Ltd (JHPL) t/as Territoria Civil* [2019] FWCFB 8678  *Kucks v CSR Limited* (1996) IR 182  *Mondalez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495  *Pooley v Commissioner of Police* (2009) IR 273  *Target Australia Pty Ltd v Shop, Distributive, and Allied Employees’ Association* [2023] FCAFC 66  *Vendrig v Ausgrid Pty Ltd* [2021] FWCFB 370 |
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| Division: | Fair Work Division |
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| Registry: | Queensland |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 51 |
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| Date of hearing: | 10 August 2023 |
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| Counsel for the Appellants: | Mr A Duffy KC with Mr S Reidy |
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| Solicitor for the Appellants: | Holding Redlich |
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| Counsel for the Respondents: | Mr S Mackie with Mr R Diger |
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| Solicitor for the Respondents: | Colin Biggers & Paislay |

ORDERS

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|  | | QUD 78 of 2023 |
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| BETWEEN: | MICHAEL MURTAGH  First Appellant  FRANCIS O'MARA  Second Appellant  INDEPENDENT EDUCATION UNION OF AUSTRALIA  Third Appellant | |
| AND: | CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF TOOWOOMBA ABN 88 934 244 646  First Respondent  DOWNLANDS COLLEGE ACN 071 878 478  Second Respondent | |

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| order made by: | COLLIER, LOGAN AND MEAGHER JJ |
| DATE OF ORDER: | 30 october 2023 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The order made in the Court’s original jurisdiction on 7 February 2023 be set aside.
3. In lieu thereof, it be declared that:
   1. On the true construction of the *Fair Work Act 2009* (Cth) (FWA) and The Catholic Employing Authorities Single Enterprise Collective Agreement - Diocesan Schools of Queensland 2019-2023, the first appellant is entitled to be paid the following by the first respondent in respect of work performed by him on and after 1 July 2019:
      1. salary arrears - $1,595.39; and
      2. superannuation contribution arrears - $151.56.

Total - $1,746.95.

* 1. On the true construction of the FWA and The Catholic Employing Authorities Single Enterprise Collective Agreement – Religious Institutes Schools of Queensland 2019-2023, the second appellant is entitled to be paid the following by the second respondent in respect of work performed by him on and after 1 July 2019:
     1. salary arrears - $387.43; and
     2. superannuation contribution arrears - $36.81.

Total: $424.24.

1. The proceedings be remitted to the Court’s original jurisdiction for the purposes of the entering up all necessary adjournments and the making of all necessary case management directions and the hearing and determination according to law of the application made by the first appellant and the second appellant.

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

REASONS FOR JUDGMENT

COLLIER J:

1. I have had the benefit of reading in draft the judgment of Logan J. I respectfully agree with his Honour’s reasons, and the orders proposed by his Honour.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 30 October 2023

REASONS FOR JUDGMENT

LOGAN J:

1. Until 6 December 2019, the date upon which his resignation took effect, the first appellant, Mr Michael Murtagh was an employee of the Roman Catholic Diocese of Toowoomba (Toowoomba Catholic Education) (Diocese). Amongst other things, the Diocese conducts a number of schools under the name Toowoomba Catholic Education. One such school is St Joseph’s College, Rangeville, Toowoomba.
2. Until 31 December 2019, when his resignation took effect, the second appellant, Mr Francis O’Mara was employed by Downlands College, Toowoomba.
3. For reasons which will become apparent, it is material to record that each of these gentlemen was so employed on 1 July 2019.
4. On 25 November 2020, the federal conciliation and arbitration commission presently known as the Fair Work Commission (industrial commission) approved, pursuant to s 186 of the *Fair Work Act 2009* (Cth) (FWA), an enterprise agreement known as *The Catholic Employing Authorities Single Enterprise Collective Agreement - Diocesan Schools of Queensland 2019-2023* (2019-2023 Diocesan Schools Agreement). That enterprise agreement came into operation on 2 December 2020, 7 days after that approval: s 54(1)(a), FWA and cl 1.2.1, 2019-2023 Diocesan Schools Agreement.
5. The coverage clause of the 2019-2023 Diocesan Schools Agreement is cl 1.4. It provides, by cl 1.4.1, that that agreement covers Toowoomba Catholic Education in relation to employees identified in, materially, cl 1.4.2, which identifies a class of employees covered as:

Any employee of the employers identified in clause 1.4.1 who is covered by the *Educational Services (Teachers) Award 2010* and the *Educational Services (Schools) General Staff Award 2010* and who is employed in a school accredited by the Non-State School Accreditation Board (NSSAB) of Queensland or its successor.

It is common ground that, up to and including the date of effect of his resignation, Mr Murtagh fell within this class of employees.

1. Likewise on 25 November 2020, the industrial commission approved a separate enterprise agreement known as *The Catholic Employing Authorities Single Enterprise Collective Agreement – Religious Institutes Schools of Queensland 2019-2023* (2019-2023 Religious Institutes Schools Agreement). That agreement also came into operation on 2 December 2020: s 54(1)(a), FWA and cl. 1.2.1, 2019-2023 Religious Institutes Schools Agreement.
2. The coverage clause of the 2019-2023 Religious Institutes Schools Agreement is cl 1.4. One employer covered is Downlands College in respect of employees identified in cl 1.4.2 as follows:

Any employee of the employers identified in clause 1.4.1 who is covered by the *Educational Services (Teachers) Award 2010* and the *Educational Services (Schools) General Staff Award 2010* and who is employed in a school accredited by the Non-State School Accreditation Board (NSSAB) of Queensland or its successor.

It is common ground that, up to and including the date of effect of his resignation, Mr O'Mara fell within this class of employees.

1. Clause 1.2 of the 2019-2023 Diocesan Schools Agreement, entitled “Commencement Date”, is as follows:

1.2.1 This Agreement shall operate seven (7) days after approval from the Fair Work Commission.

1.2.2 This Agreement shall remain in force until 30 June 2023 unless otherwise agreed in terms of the provisions of the Fair Work Act 2009.

1.2.3 Where this Collective Enterprise Agreement specifies an earlier operative date in relation to a particular provision, then that provision shall operate from that date for all applicable employees employed at that earlier date.

1. There is an equivalent “Commencement Date” clause, cl 1.2, in the 2019-2023 Religious Institutes Schools Agreement. Its overall wording differs slightly in form but not in substance from cl 1.2 of the 2019-2023 Diocesan Schools Agreement. Notably, cl 1.2.1(b) of the Religious Institutes Schools Agreement is identical to cl 1.2.3 of the 2019-2023 Diocesan Schools Agreement
2. Each enterprise agreement provides for staged salary increases. For teachers, the first of these is expressed to be operative as of the first full pay period on or after 1 July 2019. The respective salary increase clauses are in like terms. It is sufficient to set out just one of them. Clauses 4.2.1(a)(i) to (iv) of the 2019-2023 Diocesan Schools Agreement provide, respectively, for the following salary increases for teachers:

(i) 2.5% of the applicable salary rate operative as of the first full pay period on or after 1 July 2019;

(ii) a further increase of 2.5% from the first full pay period on or after 1 July 2020;

(iii) a further increase of 2.5% from the first full pay period on or after 1 July 2021; and

(iv) from the first full pay period on or after 1 July 2022, a further salary increase that will be the same headline percentage wage increase paid to teachers employed by the Queensland Department of Education on or from 1 July 2022 (excluding from that headline percentage wage increase any “catch up” component attributable to any “wage freeze” implemented by the Queensland Government affecting the increases outlined in the Department of Education State School Teachers’ Certified Agreement [CB/2019/101]).

1. Clause 4.2.4 of the 2019-2023 Diocesan Schools Agreement provides that: “The actual salaries and allowances for all classifications of teacher are set out in Schedule 1 – S1.1 (Wages, Salaries and Allowances)”.
2. By Schedule 1 – S1.1 Teachers of the 2019-2023 Diocesan Schools Agreement, a 4 Year Trained teacher classified Proficient 8 is entitled to be paid an hourly rate of $66.0933 from 1 July 2019, the rate being inclusive of the 2.5% increase.
3. By cl 4.8.3 of the 2019-2023 Diocesan Schools Agreement, Toowoomba Catholic Education is required to make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid it being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee at a contribution rate equal to 9.5% of an employee’s ordinary pay (the “superannuation contribution”). Once again, the Religious Institutes Schools Agreement contains a like provision, also numbered cl 4.8.3. It is not necessary to set that out.
4. Although the controversy in the present case relates to teachers, it may be noted that each enterprise agreement also made provision for staged salary increases, backdated to 1 May 2019, for those employed as school officers or, as the case may be, services staff. It is not necessary to set out the clauses concerned. However, it must follow that any conclusions reached concerning teachers in like circumstances to Messrs Murtagh and O’Mara would also be applicable to school officers or services staff who had, for one reason or another, ceased employment prior to each enterprise agreement becoming operative after approval by the industrial commission.
5. Neither Toowoomba Catholic Education nor Downlands College paid the 1 July 2019 salary increase (and therefore the superannuation contribution on that increase) to any of its teachers, Messrs Murtagh and O’Mara respectively included, who were employed as at 1 July 2019 but had resigned employment before the respective enterprise agreements were approved by the industrial commission and came into operation, and were no longer working in another Diocesan school at that date or, respectively, and as the case may be, another religious school.
6. Together with a registered industrial organisation, the Independent Education Union (Union), Messrs Murtagh and O’Mara instituted proceedings in the Court’s original jurisdiction against, respectively, Toowoomba Catholic Education and Downlands College as respondents. In those proceedings, each claimed a declaration under s 545 of the FWA that their former employer had contravened s 50 of the FWA by failing to pay them arrears of salary and the related superannuation contribution for which the respective enterprise agreements provided for the period between 1 July 2019 and their respective resignation dates. Each sought the imposition of a civil penalty pursuant to s 546 of the FWA in respect of the alleged contravention. In addition, Messrs Murtagh and O’Mara sought a related order, pursuant to s 547 of the FWA, that their respective former employers pay them the alleged arrears, together with interest, as follows:

(a) by Toowoomba Catholic Education to Mr Murtagh:

i. salary arrears - $1,595.39; and

ii. superannuation contribution arrears - $151.56.

Total - $1,746.95.

(b) by Downlands College to Mr O’Mara:

i. salary arrears - $387.43; and

ii. superannuation contribution arrears - $36.81.

Total: $424.24.

In jurisdictional support of their application for declaratory relief, the Union and Messrs Murtagh and O’Mara further or alternatively called in aid s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), s 21 of the *Federal Court of Australia Act 1976* (Cth) and ss 545(1), 562 and 563 of the FWA.

1. Behind these relatively modest amounts of alleged arrears lurks an industrial law issue concerning entitlement, if any, to back pay after enterprise agreements come into operation of considerable systemic importance and related difficulty. The observation (at [58]) of the learned primary judge that the provision in each commencement clause for earlier operation “could have been more clearly expressed” is, with respect, accurate and a model of understatement. Indeed, as will be seen, that observation is just as applicable to ss 51 – 54 of the FWA, which concern the application and coverage of an enterprise agreement and when such an agreement comes into operation.
2. In the result, the learned primary judge dismissed the application made by the Union, Messrs Murtagh and O’Mara. In so doing, his Honour upheld the position of Toowoomba Catholic Education and Downlands College that, on the true construction of the FWA and the respective commencement clauses, the respective enterprise agreements did not apply to employees who resigned before those agreements came into operation.
3. The Union, Messrs Murtagh and O’Mara (collectively, the appellants) have appealed against that order of dismissal.
4. Although their grounds of appeal are prolix, unnecessarily so, with respect, it became readily apparent from the careful and concise oral submissions made by the appellants’ counsel, Mr A Duffy KC and Mr S Reidy, that the essence of them was that, on the true construction of the FWA and the respective commencement clauses, the respective enterprise agreements did confer upon Messrs Murtagh and O’Mara an entitlement to the arrears which each claimed.
5. For their part, the essence of the submissions helpfully made on behalf of Toowoomba Catholic Education and Downlands College (collectively, the respondents) by their counsel, Mr S Mackie was that the learned primary judge was, for the reasons which his Honour gave, correct to dismiss the application. In effect, his Honour found that the entitlement to which s 51 of the FWA refers could only accrue to an employee to whom an enterprise agreement applied and that could only occur when, in terms of s 54 of the FWA, the agreement concerned had come into operation. On this reasoning, it necessarily followed that a person not employed at that time by an employer covered by the enterprise agreement could have no entitlement under that agreement. Another plank in this reasoning was that, per force of s 58(1) of the FWA, only one enterprise agreement could apply to an employee at a particular time. Thus, so the reasoning went, neither the 2019-2023 Diocesan Schools Agreement nor the Religious Institutes Schools Agreement could have any relevant application so as to confer an entitlement to back pay, because each only became operative after Messrs Murtagh and O’Mara had ceased employment.
6. The respondents, and in upholding their submission the primary judge, did not, however, go so far as to submit that an enterprise agreement could have no retrospective operation. Rather, so the submission went, the only employees who had an entitlement to back pay were those who remained employed as at 2 December 2020. This was because, having regard to s 52 and s 54 of the FWA, each enterprise agreement could only apply to then current employees.
7. This construction of the FWA was said by the respondents to be supported by views expressed in a number of decisions of the Full Bench of the industrial commission. The respondents also submitted that this conclusion was supported by a judgment of the Court of Appeal of the Supreme Court of Western Australia, said to be relevant by analogy.
8. Before turning to these decisions and to the merits of the respective submissions, it is necessary to set out ss 51 – 54 of the FWA and to note some other features of the FWA with respect to enterprise agreements. It is also necessary to consider a judgment of the High Court, *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593 (*ALDI Foods*) in which this scheme has fallen for consideration. Sections 51 – 54 of the FWA provide:

**51 The significance of an enterprise agreement applying to a person**

(1) An enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person.

(2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

**52 When an enterprise agreement *applies* to an employer, employee or employee organisation**

*When an enterprise agreement applies to an employee, employer or organisation*

(1) An enterprise agreement *applies* to an employee, employer or employee organisation if:

(a) the agreement is in operation; and

(b) the agreement covers the employee, employer or organisation; and

(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

*Enterprise agreements apply to employees in relation to particular employment*

(2) A reference in this Act to an enterprise agreement applying to an employee is a reference to the agreement applying to the employee in relation to particular employment.

**53 When an enterprise agreement *covers* an employer, employee or employee organisation**

*Employees and employers*

(1) An enterprise agreement *covers* an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.

*Employee organisations*

(2)  An enterprise agreement *covers* an employee organisation:

(a) for an enterprise agreement that is not a greenfields agreement—if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or

(b) for a greenfields agreement—if the agreement is made by the organisation.

*Effect of provisions of this Act, FWC orders and court orders on coverage*

(3) An enterprise agreement also *covers* an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:

(a) a provision of this Act or of the Registered Organisations Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

(4) Despite subsections (1), (2) and (3), an enterprise agreement does not *cover* an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:

(a)  another provision of this Act;

(b)  an FWC order made under another provision of this Act;

(c)  an order of a court.

*Enterprise agreements that have ceased to operate*

(5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not *cover* an employee, employer or employee organisation.

*Enterprise agreements cover employees in relation to particular employment*

(6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment.

**54 When an enterprise agreement is in operation**

(1)  An enterprise agreement approved by the FWC operatesfrom:

(a) 7 days after the agreement is approved; or

(b) if a later day is specified in the agreement—that later day.

(2) An enterprise agreement ceases to operate on the earlier of the following days:

(a) the day on which a termination of the agreement comes into operation under section 224 or 227;

(b) the day on which section 58 or subsection 278(1A) first has the effect that there is no employee to whom the agreement applies.

Note: Section 58 and subsection 278(1A) deal with when an enterprise agreement ceases to apply to an employee.

(3) An enterprise agreement that has ceased to operate can never operate again.

1. Further, as already noted, s 58(1) of the FWA provides that, “Only one enterprise agreement can apply to an employee at a particular time.”
2. Each of these sections falls within Part 2-1 of Chapter 2 of the FWA. For the purposes of that Part, s 42 provides that “employee” means a “national system employee”, and employer means a “national system employer”. “National system employee” and “national system employer” are respectively defined by s 13 and s 14 of the FWA. In essence, such an employee is one employed by a “national system employer”. The definition of the latter in s 14 has been cast with a keen eye to maximising the limits of Commonwealth legislative competence. Subject to a presently immaterial qualification, s 15 of the FWA provides that “employee” bears its ordinary meaning. It is uncontroversial that each of the respondents is a “national system employer” and thus that each of Messrs Murtagh and O’Mara was, when employed by them, a “national system employee”.
3. The scheme of the FWA, as related by s 43, is that the main terms and conditions of employment of an employee that are provided under this Act are those set out in the National Employment Standards (see Pt 2‑2) and one or the other of a modern award (see Pt 2‑3), an enterprise agreement (see Pt 2‑4) or a workplace determination (see Pt 2‑5) that applies to the employee.
4. It is apparent from Pt 2-5 of the FWA that workplace determinations as made by a Full Bench of the industrial commission are a fail-safe device to which resort is to be had in circumstances where, perhaps after industrial action, it is just not possible to settle, or settle in full, by negotiation the terms of an enterprise agreement. It is also apparent from s 57(1) of the FWA that, where an enterprise agreement has application to an employee in relation to particular employment, the enterprise agreement has paramountcy over a modern award otherwise applicable to that employee. This paramountcy gives voice to one of the objects of the FWA, found in s 3(f), which is “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”.
5. Some aspects of the making, coverage and application of enterprise agreements under the FWA but not the present issue were considered by the High Court in *ALDI Foods*. That case concerned the different issue of whether the industrial commission had power under s 186(2)(a) of the FWA to approve an enterprise agreement in circumstances where the agreement was made with the existing employees of an employer who had agreed, but had not yet started, to work as employees in a new enterprise. The High Court held that the FWA conferred such power on the industrial commission.
6. In the course of so doing, the High Court made certain observations concerning provisions within Pt 2-1 of the FWA which are relevant to the present case. The High Court made this general observation concerning Pt 2-1, “It is evident from these provisions of the Act that an enterprise agreement may “cover” an employee even though it does not yet “apply” to that employee in the sense of imposing obligations on the employee and the employer”: *ALDI Foods*, at [25]. Immediately following that observation, the court stated, at [25]:

An enterprise agreement imposes obligations on employees and employers covered by it only when it applies to such persons. Section 51 of the Act provides that an enterprise agreement does not give a person an entitlement, nor does it impose obligations on a person, unless the agreement “applies” to the person.

In the following paragraph, *ALDI Foods*, at [26], the court stated:

Importantly, ss 52 and 53 expressly indicate that an enterprise agreement may *cover* an employee when it is not in operation, but it can only *apply* to an employee when it is in operation.

[Emphasis in original]

1. There then followed this statement by the High Court, *ALDI Foods*, at [30]:

Because an employee may be covered by more than one agreement at one time, s 58(1) of the Act provides that only one enterprise agreement can *apply* to an employee at a particular time. That is because only one set of rights and obligations can be in operation in relation to the work actually performed by the employee at that time in relation to particular employment. Given the terms of ss 52 and 53, it is apparent that an employee may be covered by an agreement that applies to him or her, and by an agreement that does not, at that time, apply to him or her. Furthermore, an employee may be covered by more than one agreement at any one time. To speak of an employee being covered by an agreement is to speak of the agreement providing terms and conditions for the job performed by, or to be performed by, the employee.

[Emphasis in original]

1. On one view, these statements might be thought to support the conclusion reached by the primary judge. That might be thought to follow from the confirmation that there can be only one set of rights and obligations that at any given time applies in relation to work actually performed by an employee in relation to particular employment. As against that, the High Court recognised in *ALDI Foods* that an enterprise agreement could *cover* an employee although not yet in operation so as to *apply* to that employee. In truth, however, none of the statements in *ALDI Foods* was made with reference to the effect, if any, of the FWA provisions mentioned in respect of a clause in an enterprise agreement which even purported to have backdated operation to “applicable employees” in relation to pay rates for particular employments.
2. If anything, the dichotomy between coverage and application for which the FWA provides in respect of enterprise agreements, recognised by the High Court in *ALDI Foods*, taken in conjunction with the scheme in that Act for the approval of enterprise agreements, makes it unlikely that it was intended that there could be no backdating at all of a pay rate in respect of a particular employment. Inevitably, there will be a lag between when an enterprise agreement is made in accordance with s 182 of the FWA and any approval which the industrial commission gives to that agreement pursuant to s 186 of that Act.
3. Reflecting this, the “permitted matters” for the making of an enterprise agreement recognise that inevitability of a lag in the language of s 172(2)(a), which uses the future tense, “matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement”. Another “permitted matter” in the making of an enterprise agreement, also looks to the future, “how the agreement will operate”: s 172(1)(d), FWA. However, neither of these prescriptions of a “permitted matter” is inconsistent with the inclusion in an enterprise agreement of a clause which will provide for back pay on and from a particular date once that agreement comes into operation in the future after approval. And a factor which may be influential in engendering a majority of employees “covered” to vote for a proposed agreement, in circumstances where a lag thereafter in coming into operation is inevitable, is the knowledge that, once operative, back pay will flow to them.
4. In *Australian Workers’ Union v TAD Pty Ltd T/A Tad Industrial* [2016] FWC 1794, at [45] (*Tad Industrial*), Senior Deputy President Watson instanced, s 54 and s 52(1)(a) as explanatory of why it was that the enterprise agreement concerned did not apply to a person whose employment with the employer had ended prior to the operation date of the agreement. But that case concerned a back pay clause which was non-specific as to its application. A like view as to the effect of s 52 is also expressed by a Full Bench of the industrial commission in *Vendrig v Ausgrid Pty Ltd* [2021] FWCFB 370(*Ausgrid*) with the Full Bench finding, at [40], additional support in s 51(2) of the FWA, “An enterprise agreement does not give a person an entitlement unless the agreement applies to the person (see s 51(2)).” In neither of these industrial commission case is there any elaboration beyond these statutory references for these conclusions.
5. A further industrial commission case to which the respondents made reference, *Battye v John Holland Pty Ltd (JHPL) t/as Territoria Civil* [2019] FWCFB 8678, is not, on analysis, relevant, because it concerned a situation where, after its replacement by a later enterprise agreement which had come into operation, an employee sought to rely upon a dispute resolution clause in a superseded enterprise agreement in the absence, as the Full Bench noted, of a savings provision in the later agreement. *Ausgrid* also concerned an endeavour, after cessation of employment, to invoke a dispute resolution clause. It also concerned differently worded agreement clauses in any event.
6. I have not derived any assistance from these industrial commission cases.
7. On initial encounter, *Pooley v Commissioner of Police* (2009) IR 273(*Pooley*), a decision of the Industrial Appeal Court of Western Australia, a court constituted by three Supreme Court judges, looks to be supportive of the respondents’ contention.
8. In *Pooley*, police officers who resigned from, and ceased employment with, the police force of Western Australia prior to the registration of the Western Australia Police Industrial Agreement 2006 (the 2006 Agreement) claimed entitlements under the 2006 Agreement for the period between 1 July 2006 and the date on which they ceased to be employed. The 2006 Agreement was executed on 11 December 2006 and registered by the state industrial commission on 18 December 2006. Clause 1(2) of the 2006 Agreement provided that the agreement replaced an earlier agreement. Clause 4(1) provided that the agreement operated from the date of its registration to 30 June 2009. Clause 4(2) provided:

(a) Despite subclause (1), above, the Employer will pay employees the increased salary and allowances (other than the covert allowance) provided for in this Agreement as from 1 July 2006;

(b) Payment of shift allowance under clause 16 for shifts worked on or after 1 July 2006 but before the registration of this Agreement will be based on the shift definitions set out in the [2003 Agreement]. (For example, an employee who works an afternoon shift (as that term is defined in the [2003 Agreement]) after 1 July 2006 but before registration of this Agreement will be entitled to payment for that shift at the afternoon rate specified in this Agreement. This is the case irrespective of whether, under this Agreement, the shift work would have been classified as an afternoon shift or an evening shift).

Section 41(4) of the *Industrial Relations Act 1979* (WA) provided:

An industrial agreement extends to and binds —

(a) all employees who are employed —

(i) in any calling mentioned in the industrial agreement in the industry

or industries to which the industrial agreement applies; and

(ii) by an employer who is —

(I) a party to the industrial agreement; or

(II) …

and

(b) all employers referred to in paragraph (a)(ii) and no other employee or employer, and its scope shall be expressly so limited in the industrial agreement.

1. In concluding that the appellant, former police officers, had no entitlement to the increased pay and allowances for the period Le Miere J, with whom Wheeler and Pullin JJ agreed, stated, *Pooley*, at [30] – [31]:

30. The 2006 Agreement extends to and binds employees by reason of s 41 of the Act. Section 41(4) of the Act provides that an industrial agreement extends to and binds, amongst others, all employees who are employed in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies.

31. The words “who are employed” refer to persons who are employed in the relevant calling by an employer who is a party to the industrial agreement during the time the industrial agreement is in effect. It does not refer to employees who were employed at a time before the industrial agreement came into effect; that is, before its registration. Persons who were employees prior to the registration of the industrial agreement but not as at the date of the registration are not “employees who are employed” for the purposes of s 41(4).

1. All that need be said of *Pooley* is that an impression formed of its relevance on initial encounter does not survive the realisation that it concerns a differently worded statutory regime to that in the FWA and a differently worded clause concerning the operation and coverage of the backdated pay rates in the presently relevant enterprise agreements.
2. The selection of 1 July 2019 as the operative date for the pay increases for teachers for which the respective enterprise agreements provided was hardly coincidental. The nominal expiry dates of their predecessor enterprise agreements, Catholic Employing Authorities Single Enterprise Collective Agreement-Diocesan Schools of Queensland 2015-2019 (hitherto applicable to Mr Murtagh) and the Catholic Employing Authorities Single Enterprise Collective Agreement – Religious Institutes Schools Queensland 2015-2019 (hitherto applicable to Mr O’Mara) was 30 June 2019. In these circumstances, s 58(2)(e) of the FWA became applicable on and from 2 December 2020, when each of the subject enterprise agreements came into operation. That subsection provides:

(2) If:

(a) an enterprise agreement (***the earlier agreement***) applies to an employee in relation to particular employment; and

(b) another enterprise agreement (***the later agreement***) that covers the employee in relation to the same employment comes into operation;

…

(e) if the earlier agreement has passed its nominal expiry date--the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again.

1. The dichotomy between “applies” and “covers” in s 58(2)(a) and s 58(2)(b) of the FWA reflects the dichotomy between coverage and application noted by the High Court in *ALDI Foods* in relation to the scheme in the FWA in respect of enterprise agreements. The predecessor enterprise agreements were, in terms of s 58(2)(a) of the FWA “earlier agreements”. The 2019-2023 Diocesan Schools Agreement and the Religious Institutes Schools Agreement were each a “later agreement” in terms of s 58(2)(b) of the FWA. In these circumstances, the effect of s 58(2)(e) is that, on 2 December 2020, the predecessor enterprise agreements forever ceased to have application. But, even before then, the 2019-2023 Diocesan Schools Agreement and the Religious Institutes Schools Agreement respectively covered Messrs Murtagh and O’Mara up to the times of their resignations. As soon as the 2019-2023 Diocesan Schools Agreement and the Religious Institutes Schools Agreement came into operation on 2 December 2020 following approval by the industrial commission, the whole of those enterprise agreements came into operation. Part of each whole was, in each enterprise agreement, a commencement date clause which provided for staged pay increases for “applicable employees” on and from 1 July 2019. In my view, it is not inconsistent with s 58(2)(e) of the FWA to construe that provision as giving force and effect to those commencement date clauses as soon as each enterprise agreement came into operation.
2. Neither is this inconsistent with s 54 of the FWA. What s 54 brought into operation on 2 December 2020 were enterprise agreements which provided, materially, for staged pay rate increases for work performed by employees in particular teacher employments covered by those agreements commencing on 1 July 2019. In terms of s 52(1)(a) of the FWA, it was to those teacher employees then so covered that the enterprise agreements respectively applied on and from 2 December 2020. In terms of s 51 of the FWA, only on and from 2 December 2020 were obligations to pay and entitlements to receive those pay increases created in respect of work performed in particular employment, a particular “job”, on and from 1 July 2019. In this context, one observation made by the High Court in *ALDI Foods*, at [30] bears repeating, “To speak of an employee being covered by an agreement is to speak of the agreement providing terms and conditions for the job performed by, or to be performed by, the employee”. The FWA leaves it to those who will be covered to settle upon those terms and conditions. The operative dates for the staged pay increases were part of those terms and conditions.
3. If there were any doubt as to the text of ss 51, 52, 54 and 58 of the FWA permitting these enterprise agreements to provide for their application, once operative, to pay rates for work performed before then, any constructional choice is resolved in favour of so construing these provisions by recourse to the explanatory memorandum for the Bill which became the FWA. Paragraph 196 of that explanatory memorandum states:

196. The terms of an agreement can only have any effect when an agreement commences operation.  *However, this does not preclude an agreement from including a term that has retrospective effect (e.g., a backdated wage increase).*

[Emphasis added]

As the words emphasised highlight, the very type of provision in an enterprise agreement which falls for consideration in the present appeal was contemplated and regarded as permissible by statute.

1. In each enterprise agreement, it makes no sense to construe “applicable employee” as meaning anything other than those employees covered by the agreement as at a given operative date, materially here 1 July 2019. That construction best reflects the “practical bent of mind” to which Madgwick J referred in *Kucks v CSR Limited* (1996) IR 182, at 184, in observations concerning the approach to the construction of industrial instruments, much later cited with approval. The obvious intent is that, once the enterprise agreements become operative, there will be a seamless transition between old pay rates thereby made forever inapplicable and new pay rates, applicable for teachers in respect of work performed on and from 1 July 2019.
2. In neither agreement is there an overt intention to discriminate in terms of coverage as between teachers who were employed as at 1 July 2019 but who cease employment before each agreement comes into operation and those who remain employed when the agreement comes into operation. And it would be a distinctly anomalous construction both of the coverage clause and especially the plain text of the operative date clause to construe each as so discriminating. Such constructions are to be eschewed: *Target Australia Pty Ltd v Shop, Distributive, and Allied Employees’ Association* [2023] FCAFC 66, at [56]. They are antithetical to the statutory objective of “fairness” remarked upon by Kiefel CJ, Nettle and Gordon JJ in *Mondalez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, at [14].
3. Such a construction of the enterprise agreements and their application is consistent with the text of s 58(2) of the FWA. It creates no retrospective contravention. All that it means is that, on and from 2 December 2020, Toowoomba Catholic Education and Downlands College, as employers covered by the respective agreements, came under an obligation to pay back pay to “applicable employees” at the first pay period after that date. Those “applicable employees” included Messrs Murtagh and O’Mara, because they fell within the class of “applicable employees” and each had performed work on and from 1 July 2019. On and from 2 December 2020, only one enterprise agreement, the 2019-2023 Diocesan Schools Agreement and the Religious Institutes Schools Agreement respectively, was applicable as the pay rate on and from, materially, 1 July 2019 for the performance of work by teacher employees covered by those agreements.
4. What follows from the foregoing is that I respectfully disagree with the conclusion reached by the learned primary judge. I would therefore allow the appeal, set aside the orders made by the primary judge and make the consequential declarations as to entitlements to back pay sought by the appellants.

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| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 30 October 2023

REASONS FOR JUDGMENT

MEAGHER J:

1. I have had the benefit of reading the judgment of Logan J. I respectfully agree with his Honour’s reasons and orders.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Meagher . |

Associate:

Dated: 30 October 2023