Qantas in the High Court: is it still OK to outsource?

In a decision handed down on 13 September 2023, the High Court of Australia unanimously dismissed an appeal by Qantas Airways Limited (**Qantas** or **Airline**) seeking to challenge a Federal Court ruling that the Airline had breached the General Protections provisions in Part 3-1 of the *Fair Work Act 2009* (Cth) (**FW Act**) when it decided to outsource service and baggage handling at 10 Australian airports.[1]

The facts

As part of its response to the COVID-19 pandemic, in August 2020 Qantas announced that in addition to approximately 6,000 redundancies that it had effected two months earlier, it would outsource some 2,500 ground crew and baggage handler positions at 10 Australian airports.[2] It was anticipated that this would result in cost-savings for the Airline of approximately A$100 million per annum.

In making this announcement, Qantas indicated that staff and the Transport Workers' Union of Australia (**TWU** or **Union**) would be afforded an opportunity to bid for the outsourced work. Indeed, it was obliged to provide the Union with this opportunity by force of a provision in the relevant enterprise agreement.[3]

The TWU engaged the services of a leading business consultancy to help it prepare its bid and in due course this was submitted to the Airline. The bid was subsequently revised on a number of occasions, but in November 2020 Qantas announced that the bid had been unsuccessful and that the contract had been let to other providers.

That same month, Qantas proceeded to implement the proposed outsourcing program, and in consequence made the positions of some 1,700 employees redundant. Many, though not all, of these employees were members of the TWU.

The legislative framework

Section 341(1) of the FW Act provides that 'a person' must not take 'adverse action' against another person:

a. because the other person:
   i. has a workplace right; or
   ii. has, or has not, exercised a workplace right; or
   iii. proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
b. to prevent the exercise of a workplace right by the other person.

1 [2023] HCA 27.

2 The employees concerned were employed by either Qantas or Qantas Ground Services Pty Ltd (**QGS**).

3 Qantas Airways Limited and QCatering Limited – Transport Workers Agreement 2018, cl 11. Employees of QGS were covered by the Qantas Ground Services Pty Limited Ground Handling Agreement 2015. Clause 11 of the 2018 Agreement had originated in a workplace determination that was made at the conclusion of highly contentious industrial action in 2012.

The meaning of 'workplace right' is set out in section 341(1), which relevantly states that:

A person has a workplace right if the person:

a. is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

b. is able to institute, or participate in, a process or proceedings under, a workplace law or workplace instrument; or

c. is able to make a complaint or inquiry:

i. to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument…

It is clear from section 341(2) that 'a process or proceedings under, a workplace law' would include organising or participating in protected industrial action or a protected action ballot, and 'making, varying or terminating an enterprise agreement'.

According to the table set out in section 342(1) of the FW Act, 'adverse action' would encompass a broad range of conduct, including termination of employment.

Once it is established that a person has been subjected to adverse action, section 361 of the FW Act has the effect that the onus shifts to the alleged perpetrator to prove that that action was not taken with a proscribed intent. It is irrelevant in this context whether the perpetrator was actuated by both permissible and impermissible motives when taking adverse action – section 360 of the FW Act makes clear that for purposes of Part 3-1 'a person takes action for a particular reason if the reasons for the action include that reason'.

Proceedings for alleged contravention of section 340 can be brought by a person affected by the alleged contravention, an 'industrial association' (which would include a trade union or employer association), or the Fair Work Ombudsman. If satisfied that the respondent has contravened or proposes to contravene the relevant provision, the Federal Court or the Federal Circuit and Family Court 'may make any order the court considers appropriate'.

By way of illustration, such orders can include:

- **injunctions** to 'prevent, stop or remedy' the effects of a contravention;
- orders for the payment of **compensation** for loss suffered as a consequence of the contravention, with no upper limit as to amount;
- orders for the **reinstatement** of a person;[4] and
- orders for the payment of **pecuniary penalties** by any person who is found to have contravened the relevant provision.[5]

The proceedings

Following the rejection of its bid for the outsourced work, the TWU initiated Federal Court proceedings in early December 2020 in which it alleged that the Airline's actions were unlawful by force of the 'General Protections' provisions in the FW Act.

It was common ground throughout the proceedings that the employees whose positions had been made redundant had been subjected to 'adverse action' within the meaning of section 342(1) of the FW Act.[6] The issue turned, therefore, upon whether that action had been taken for reasons that were proscribed by section 340(1).

Specifically, the Union alleged that its members had been subjected to 'adverse action':

- *because* of their union membership;
- *because* they were entitled to the benefits of the QAL Agreement and the QGS Agreement;
- *because* they had an ability to participate in enterprise bargaining;
- *because* they had, or would have, an ability to participate in a protected action ballot and protected industrial action;
- to *prevent* them participating in enterprise bargaining; and
- to *prevent* them exercising the workplace right, following the nominal expiry date of enterprise agreements which covered and applied to them, to participate in a protected action ballot and organise and/or engage in protected industrial action for the purpose of supporting or advancing claims in relation to one or more replacement agreements.[7]

In response to these assertions, Qantas argued that its decision-making had not been motivated by a proscribed ground, but rather that it had been driven solely by three key 'imperatives' or 'challenges':

1. to achieve two-year cost targets by reducing operating costs;
2. to increase variability in its cost base; and
3. to 'minimise capital expenditure, grow customer confidence and deliver ongoing business improvement'.[8]

In July 2021 Justice Lee determined that in rejecting the TWU's bid, Qantas had breached the 'General Protections' provisions in Part 3-1 of the FW Act.[9] His Honour reached this conclusion essentially because Qantas had failed to discharge the onus of showing that its actions were not motivated in part by a proscribed reason:

4 Respectively, FW Act, section 545(2)(a), (b) and (c).

5 FW Act, section 546.

6 See, for example, [2023] HCA 27, [2] (Plurality); [61] (Justices Gordon and Edelman); and [90] (Justice Steward).

7 Based on T*ransport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873 and [2021] FCA 1012, [4].

8 [2021] FCA 873, [138]. See also [2022] FCAFC 71, [12].

9 *Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873 and T*ransport Workers' Union of Australia v Qantas Airways Limited (No 2)* [2021] FCA 1012.

> I am not satisfied that Qantas has proved on the balance of probabilities that Mr David [the decision-maker] did not decide to outsource the ground operations for reasons which included the Relevant Prohibited Reason. As will already be obvious, this conclusion reflects my unease as to the state of the evidence on this fact in issue and, in particular, Mr David's evidence when viewed in the light of all the other evidence to which I have made reference.[10]

And:

> In the end…my conclusion after considering all the evidence is that the facts proved on the balance of probabilities fall short of a reasonable basis for a definite conclusion, affirmatively drawn, that Mr David did not decide to outsource the ground operations *partly to prevent the exercise by the affected employees of their workplace right to organise and engage in protected industrial action and participate in bargaining in 2021*. Or, to put it another way, it may be that a substantial and operative reason for Mr David making the outsourcing decision was not the Relevant Prohibited Reason, but by reference to all the evidence, I am not reasonably satisfied on the preponderance of probabilities that this fact has been proved by Qantas. In these circumstances, and in this respect, Qantas has not discharged its onus. [Emphasis added][11]

Despite his finding that Qantas had contravened the FW Act, Justice Lee rejected the Union's applications for the reinstatement of the dismissed employees.[12] The TWU appealed to the Full Court of the Federal Court against this refusal, whilst Qantas appealed against the finding that it had contravened the FW Act.

No orders for the payment of compensation, or the imposition of penalties, were made pending the outcome of the appeals against liability and the refusal to require reinstatement.[13]

Both Full Court appeals were unsuccessful.[14]

Qantas then sought, and obtained, special leave to appeal to the High Court of Australia.[15] The Minister for Employment and Workplace Relations intervened in the High Court proceedings in support of the Full Court's decision.

Although the seven members of the High Court agreed that the Airline's appeal should be dismissed, their Honours handed down three separate sets of reasons for doing so: (i) Chief Justice Kiefel and Justices Gageler, Gleeson and Jagot (**Plurality**); (ii) Justices Gordon and Edelman; and (iii) Justice Steward. Despite the fact that there were some differences of emphasis as between the three opinions, all seven members of the Court based their conclusions on essentially the same grounds.

Now that all appeals have been exhausted, the Union's claims for compensation and the imposition of penalties can proceed.[16] Media speculation and union commentary suggest that both compensation and penalties may be substantial. However, even if that proves to be the case, it is important to bear in mind that it has already been determined the employees whose employment was unlawfully terminated are not entitled to get their jobs back, and that that finding is not affected by the decision of the High Court.

Qantas' case

In its High Court appeal, Qantas did not challenge the finding that it had failed to discharge the section 361 onus.[17] Instead, it based its case on two contentions: one broad, and one narrow. These were summarised by the Plurality in the following terms:

> The broader contention was that section 340(1)(b) bites only where a workplace right is presently in existence at the time adverse action is taken. The narrower contention, advanced in the alternative, was that an employer does not "prevent" the exercise of a workplace right by an employee within the meaning of section 340(1)(b) merely by taking advantage of a "window of opportunity" to take adverse action against the employee at a time when "architectural feature[s]" of the Act operate to prevent the employee from exercising a workplace right including by taking industrial action in response.[18]

As noted below, all seven members of the Court considered that these propositions could not be sustained.[19]

10 [2021] FCA 873, [288].

11 [2021] FCA 873, [302].

12 *Transport Workers' Union of Australia v Qantas Airways Limited (No 4)* [2021] FCA 16.

13 See T*ransport Workers' Union of Australia v Qantas Airways Limited (No 3)* [2021] FCA 1339.

14 [2022] FCAFC 71. For an analysis of the Federal Court decisions, see Corrs Chambers Westgarth, 'Business restructuring and the General Protections provisions of the Fair Work Act: lessons from the Qantas Case' [*https://go.corrs.com.au/rs/596-VPW-402/images/CCW_Article Insight Qantas Full Court.pdf*].

15 *Qantas Airways Limited v Transport Workers Union of Australia*, High Court of Australia, 18 November 2022. See also 'Qantas wines special leave to challenge adverse action ruling', Workplace Express, 18 November 2022.

16 See, for example, 'TWU seeking quick payout for unlawfully-sacked (sic) Qantas workers', *Workplace Express*, 13 September 2023; 'Qantas case back in court next week', *Workplace Express*, 13 September 2023.

17 [2023] HCA 27, [64] (Justices Gordon and Edelman); [98] (Justice Steward).

18 [2023] HCA 27, [5] (Plurality). See also [28]-[30] (Plurality).

19 [2023] HCA 27, [5] (Plurality); [66]-[87] (Justices Gordon and Edelman); and [98] (Justice Steward).

High Court's approach

All seven members of the High Court proceeded on the basis that Qantas had what the Plurality described as 'sound commercial reasons' for the outsourcing decision,[20] and that in appropriate circumstances there was nothing in Part 3-1 of the FW Act to prevent Qantas or any other business from taking and implementing such a decision in the future.

The Plurality noted:

> The evident object of section 340(1) is to protect workplace rights by protecting persons from adverse action for specified reasons connected with their holding or exercise of workplace rights. The provision affords scope for lawful adverse action to achieve any number of objectives, provided that the action is not substantively actuated by a purpose or reason inimical to a person holding or exercising workplace rights.[21]

In particular:

> … adverse action will not offend section 340(1) if taken with mere awareness of an effect on another person's workplace rights. Instead, adverse action will only offend the section if it is taken for a proscribed reason: "because" the person against whom it is taken has a workplace right or has (or has not) done something in relation to the exercise of a workplace right within the scope of section 340(1)(a), or "to prevent" the exercise of a workplace right by that person within the scope of section 340(1)(b). As already noted, the proscribed reason must be a substantial and operative reason for taking the adverse action against the other person.[22]

Justices Gordon and Edelman made the same point in a slightly different way:

> … nothing in these reasons should be understood as suggesting that employers are prevented from considering the existence and terms of enterprise agreements in making decisions about the future. In fact, to fail to do so might in some circumstances constitute a breach of duty. There is no legal or practical difficulty in allowing such a matter to be considered by a decision-maker. However, what is not permissible, and what section 340(1)(b) protects against, is the taking of adverse action to prevent the exercise of a workplace right, whether presently existing or not. If Qantas had established, for example, that its reason for the outsourcing decision was to generate substantial savings in order to address imminent liquidity issues (with the inevitable consequence of that decision being termination of employment of staff), and that its reasons *did not include* a substantial and operative reason of preventing the employees affected by the outsourcing decision from organising and engaging in protected industrial action, then the outsourcing decision would not have been for a proscribed or prohibited purpose (and the termination would not have been unlawful under section 340).

As their honours pointed out: Qantas did not establish that this was the case. On the contrary, it was clear that the Airline had 'additional reasons' for its decision which were 'substantial and operative', which were proscribed by section 340(1) as they were intended 'to prevent the affected employees from exercising workplace rights to organise and engage in protected industrial action and to participate in bargaining', and which it could *not* show were not motivated by that proscribed ground.[23]

It was indeed the case that the employees could not exercise the relevant workplace rights at the time the outsourcing decision was implemented – for example because one of the agreements had not yet reached its nominal expiry date, whilst the employees covered by the other had not taken the relevant procedural steps lawfully to take industrial action. The fact remained, however, that 'it was expected at the time of the outsourcing decision that, in the absence of the outsourcing decision, the affected employees would be able to exercise and would in fact exercise those workplace rights in 2021.' [24]

Put simply:

> …a person who takes adverse action against another person for a substantial and operative reason of preventing the exercise of a workplace right by the other person contravenes section 340(1)(b), regardless of whether that other person has the relevant workplace right at the time the adverse action is taken. Qantas did not avoid the operation of section 340(1)(b) in relation to its adverse action by taking the action prior to the existence of the workplace rights the exercise of which Qantas sought to thwart.[25]

As noted earlier, Justice Lee at first instance was uncomfortable about the quality of some of the evidence led on behalf of Qantas, especially in relation to the motivations of the key decision-maker, and those who provided input into the decision-making process. This suggests that if the evidence had been of a different quality and/or had been presented in a different manner, the outcome of the proceedings might not have been the same. This supposition is implicit in the opinions of all members of the High Court – especially that of Justice Steward.

20 [2023] HCA 27, [3].
21 [2023] HCA 27, [41].
22 [2023] HCA 27, [41].
23 [2023] HCA 27, [3].
24 [2023] HCA 27, [3]. See also [57].
25 [2023] HCA 27, [6]. See further the reasoning of the Plurality on the proper interpretation of section 340(1)(b) as set out at [45]-[56].

His Honour noted that there were a number of commercial and substantive factors that could properly have formed the basis for the outsourcing decision,[26] but that Justice Lee had been impelled to the conclusion that Qantas 'had simply failed to discharge its onus of demonstrating that the reason pleaded by the TWU for taking adverse action, presumed by section 361 to exist, was incorrect.'[27] As noted earlier, this in turn reflected the trial judge's unease at the state of the evidence led by Qantas as to the motivations of the decision-maker when deciding to implement the outsourcing program. For Justice Steward, the trial judge's findings supported the proposition that Qantas had failed to discharge the section 361 onus only 'on the narrowest of grounds'.[28]

Qantas in perspective

In light of the industrial and legal issues that were at stake, it is not surprising that the decision in Q*antas* should have been greeted by enthusiasm by the labour movement – especially in the context of current political and industrial controversies about outsourcing, the proposed regulation of labour hire arrangements, and corporate misbehaviour in general, and by Qantas in particular.[29] These considerations also make it unsurprising that the decision should have attracted a great deal of media interest. It may be, however, that both the enthusiasm and the interest are somewhat overblown.

The factual circumstances in *Qantas* were unusual – both in terms of the manner in which they were presented to the Federal Court, and the way in which the Airline chose to argue its case. Nevertheless, it is surely not without significance that all eleven judges who heard the case agreed as to the outcome.[30] This suggests that despite these distinctive features, the final decision was largely unexceptionable as an application of the relevant statutory provisions and the attendant case law to the facts as presented. In other words, *Qantas* does not break any new ground in terms of the interpretation and application of Part 3-1 the FW Act: rather, it consists of an application of established principle in a somewhat unusual set of circumstances.

This clearly suggests that businesses that want to outsource all or part of their activities remain able to do so lawfully – provided that appropriate measures are taken to ensure that they can show that their decision-making was not infected by considerations that are contrary to the requirements of the FW Act. The same is true for other forms of business restructuring such as vertical or horizontal re-organisation or changes in market focus.

To do that it is necessary to ensure:

- that all steps in the decision-making process are supported by a **clear, credible and evidence-based narrative** of what is being done, and why;
- that decision-makers can, and if/when called upon to do so, **do in fact explain the whole of that narrative**; and
- that if the narrative falls to be subjected to judicial scrutiny at some point, it be put before the court in a clear and comprehensive form that **enables the whole of the decision-making process to be explained and defended**.

Although it is clear that, with the exercise of an appropriate level of care, it is possible to implement an outsourcing program lawfully without running afoul of the General Protections provisions of the FW Act, it is important to bear in mind that the attractions of doing so may be compromised by various other provisions of that Act.

Notably these would include the transfer of business provisions in Part 2-8, which have the effect that the terms of any enterprise agreement that applies to employees of the transferor of all or part of a business would also become binding on the provider of outsourced services (transferee) if those employees are engaged by the transferee to perform 'the same or substantially the same' work as they had formerly performed for the transferor.

They may also include the 'same job same pay' provisions of the Loopholes Bill if/when they become law. That will not occur before early 2024, and it is not clear at this stage precisely what form the proposed provisions will take. Nevertheless, it is clear from the Bill that is presently before the Parliament that implementation of the 'same job same pay' principle as understood by the current Federal Government may have the effect that the provider of outsourced services would be required to observe the terms and conditions of any enterprise agreement that applied to the outsourcing entity in relation to those services. Depending on the nature of the contractual arrangements between the outsourcer and the service provider this may have the effect that there would be little to be gained in commercial terms by going to the time and trouble of taking the steps necessary to minimise exposure to the effects of Part 3-1 and/or Part 2-8 of the FW Act.

26 [2023] HCA 27, [111]-[113].

27 [2023] HCA 27, [113].

28 [2023] HCA 27, [114].

29 These concerns clearly help inform the Fair Work Legislation Amendment (Closing Loopholes) Bill (**Loopholes Bill**) which was introduced in the Parliament on 4 September 2023. For description and discussion of these proposals, see [*https://go.corrs.com.au/rs/596-VPW-402/images/Corrs%20Update%20-%20Closing%20Loopholes%20Bill%202023.pdf*].

30 It should be noted, however, that only Justice Lee had the opportunity to make a direct assessment of the credibility of the relevant Qantas operatives. As is invariably the case, members of the appellate courts based their decisions on the facts as found by the trial judge.

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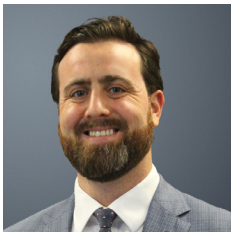

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