

FEDERAL COURT OF AUSTRALIA

Veeraragoo v Goldbreak Holdings Pty Ltd [2018] FCA 1148

File number: WAD 58 of 2018

Judge: **COLVIN J**

Date of judgment: 1 August 2018

Catchwords: **PRACTICE AND PROCEDURE** - application for default judgment against second respondent under r 5.23 *Federal Court Rules 2011* (Cth) - where proceedings concern the applicant's dismissal from employment in contravention of *Fair Work Act 2009* (Cth) - whether relief including declaratory relief ought to be granted - failure to comply with orders - application granted

Legislation: *Fair Work Act 2009* (Cth) ss 44(1), 50, 323(1), 352, 368, 550(1), 550(2)
Federal Court Rules 2011 (Cth) rr 5.02, 16.32

Cases cited: *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; (2007) 161 FCR 513
Construction, Forestry, Mining and Energy Union v Clarke [2007] FCAFC 87
Fair Work Ombudsman v Al Hilfi [2015] FCA 313
Fair Work Ombudsman v Priority Matters Pty Ltd [2017] FCA 833
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37
Hipages Group Pty Ltd v Reach Aussie Pty Ltd [2017] FCA 112
Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union [2006] WASC 144

Date of hearing: 1 August 2018

Registry: Western Australia

Division: General Division

National Practice Area: Employment & Industrial Relations

Category: Catchwords

Number of paragraphs: 26
Counsel for the Applicant: Mr D Scaife
Solicitor for the Applicant: Eureka Lawyers
Counsel for the Respondents: The Respondents did not appear

ORDERS

WAD 58 of 2018

BETWEEN: **LOVANITASING VEERARAGOO**
Applicant

AND: **GOLDBREAK HOLDINGS PTY LTD (ACN 116 804 712)**
First Respondent

BRADLEY DAVID WRIGHT
Second Respondent

JUDGE: **COLVIN J**

DATE OF ORDER: **1 AUGUST 2018**

DEFAULT JUDGMENT AGAINST SECOND RESPONDENT

THE COURT DECLARES THAT:

1. Pursuant to s 550(1) of the *Fair Work Act 2009* (Cth) the second respondent contravened s 340(1) of the *Fair Work Act* by dismissing the applicant from her employment with the first respondent on 16 October 2017 because the applicant had exercised her workplace right to take personal leave pursuant to cl 5.2.1.2 of The Local Shack - Enterprise Agreement 2015 (**Agreement**).
2. Pursuant to s 550(1) of the *Fair Work Act* the second respondent contravened s 352 of the *Fair Work Act* by dismissing the applicant from her employment with The Local Shack on 16 October 2017 because the applicant had been temporarily absent from work due to illness or injury of a kind prescribed by the *Fair Work Regulations 2009* (Cth).
3. Pursuant to s 550(1) of the *Fair Work Act* the second respondent contravened s 345(1) of the *Fair Work Act* by making a false or misleading representation that by taking personal leave pursuant to the Agreement the applicant had abandoned her employment and breached the *Fair Work Act*.
4. Pursuant to s 550(1) of the *Fair Work Act* the second respondent contravened s 44(1) of the *Fair Work Act* by failing to give the applicant a copy of the Fair Work Information Statement.

5. Pursuant to s 550(1) of the *Fair Work Act* the second respondent contravened s 44(1) and s 323(1) of the *Fair Work Act* by failing to pay the applicant her accrued annual leave in full.
6. Pursuant to s 550(1) of the *Fair Work Act* the second respondent contravened s 50 of the *Fair Work Act* by contravening the Agreement by failing to pay the applicant her salary for the period 1 to 15 October 2017.
7. Pursuant to s 550(1) of the *Fair Work Act* the second respondent contravened s 50 of the *Fair Work Act* by contravening the Agreement by failing to give the applicant notice, or to pay the applicant in lieu of notice, of the termination of her employment equal to the minimum period of notice of two weeks.

THE COURT ORDERS THAT:

8. The second respondent do pay compensation and damages to the applicant in an amount to be assessed.
9. The matter be listed for a hearing on 3 September 2018 at 2.15 pm to determine:
 - (a) the amount of compensation;
 - (b) the quantum, if any, of special damages for economic loss caused by the applicant's dismissal;
 - (c) the quantum, if any, of general damages, for pain and suffering;
 - (d) the amount, if any, of penalties to be imposed on the second respondent pursuant to s 546(1) of the *Fair Work Act*;
 - (e) any interest to be paid; and
 - (f) the terms of any ancillary orders.
10. By 20 August 2018 the applicant shall file and serve an outline of submissions and any further affidavit on which the applicant wishes to rely at the hearing on 3 September 2018.
11. By 27 August 2018 the second respondent shall file and serve an outline of submissions and any affidavit on which the second respondent wishes to rely at the hearing on 3 September 2018.
12. To the extent necessary there by an extension of time to enable the originating application in these proceedings to be commenced.

13. The applicant may effect service in accordance with these orders by sending them by email to the address brad@thelocalshack.com.au and by mail to 6 Taupo Glade, Joondalup WA 6027.
14. These orders shall be served as soon as possible on the second respondent.
15. The costs of today be reserved.

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

REASONS FOR JUDGMENT

COLVIN J:

- 1 On 21 February 2018, Ms Lovanitasing Veeraragoo commenced proceedings in this Court alleging that she was dismissed from employment by Goldbreak Holdings Pty Ltd in contravention of a general protection afforded by the *Fair Work Act 2009* (Cth). She also claimed that Mr Bradley David Wright was the general manager of Goldbreak at the relevant time and was involved in the contravention by Goldbreak. Since the commencement of these proceedings, Goldbreak has been placed in administration.
- 2 On 19 March 2018, the matter came before me for an initial case management hearing. I adjourned the matter to a case management hearing on 16 April 2018 and noted that there may be an application for orders as to the manner of service of the proceedings at that time.
- 3 On the affidavit evidence now before me, the application and a statement a claim, together with a copy of the orders made on 19 March 2018, were personally served on Mr Wright on 21 March 2018.
- 4 Under r 5.02 *Federal Court Rules 2011* (Cth) a respondent served with an originating application must file a notice of address for service before the return date fixed in the originating application. Even though it appears that the application was endorsed with the original case management hearing date of 19 March 2018, the service of the court documents, together with the orders made on 19 March 2018, made clear that the matter was to be returned on 16 April 2018. Therefore, Mr Wright had an obligation to file a notice of address for service before 16 April 2018.
- 5 Under r 16.32 a respondent must file a defence within 28 days after service of the statement of claim.
- 6 On 16 April Mr Wright failed to appear and I made orders that the matter be adjourned to today and noted in those orders that Ms Veeraragoo may move for judgment in default at that time.
- 7 Ms Veeraragoo has today asked for default judgment to be entered on claims for declaratory relief, compensation and for orders for assessment of damages.

8 On the evidence before me, I am satisfied that steps have been taken to inform Mr Wright that judgment in default will be sought today.

9 Mr Wright has failed to file a notice of address for service or a defence and does not appear today. Therefore, there has been default by Mr Wright.

Relevant principles

10 It is well established that where a statement of claim has been served, an application for judgment to be entered in default is to be considered on the basis that the allegations in the statement of claim are deemed to be admitted. However, the default is not a concession that there is an entitlement to the relief sought.

11 Further, if the circumstances in the particular case are such that it is appropriate for declaratory relief to be granted, then there is no rule of law against the grant of declaratory relief despite the failure by the party against whom the relief is sought to appear and oppose the grant of the relief. Declarations may be made in default where it is appropriate because of their deterrent effect. Where relief is discretionary, evidence may be led to support the grant of the relief provided it does not depart from or supplement the pleaded case. It is important that judgment is not entered in default in respect of a different case to that which is disclosed by the statement of claim that it has been served on the defaulted party.

12 As to the principles stated in [10] and [11], see the decision of the Full Court in *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; (2007) 161 FCR 513 at [42] and the review of the relevant authorities by Besanko J in *Fair Work Ombudsman v Al Hilfi* [2015] FCA 313 at [19]-[23] and Perry J in *Hipages Group Pty Ltd v Reach Aussie Pty Ltd* [2017] FCA 112 at [19]-[24].

Allegations deemed to be admitted

13 I have been asked to receive an affidavit of Ms Veeraragoo dated 24 July 2018 which sets out details of some of the events said to support the claim. I do not proceed on the basis of those matters but, rather, on the basis of the deemed admission of the matters in the statement of claim. The deemed admissions establish the following:

- (1) Ms Veeraragoo was an employee of Goldbreak;
- (2) Mr Wright was the general manager of Goldbreak;

- (3) the employment of Ms Veeraragoo by Goldbreak was covered by The Local Shack Enterprise Agreement 2015;
- (4) Ms Veeraragoo was entitled to take personal leave under the agreement;
- (5) on 13 October 2017, Mr Wright threatened to cancel the sponsorship of Ms Veeraragoo's work visa;
- (6) on 14 October 2017, Ms Veeraragoo was temporarily absent from work on personal leave absence;
- (7) on 14 October 2017, Ms Veeraragoo provided a medical certificate to Goldbreak in respect of her absence;
- (8) on 16 October 2017, Ms Veeraragoo was summarily dismissed for failing to attend work for reasons that included her actions in taking a personal leave absence and despite providing a medical certificate;
- (9) Ms Veeraragoo was dismissed from her employment without payment of 19.98 hours of accrued leave or her salary for the period 1 to 15 October 2017, or two weeks pay in lieu of notice, as required by the Agreement; and
- (10) at no time did Goldbreak provide a copy of the Fair Work Information Statement to Ms Veeraragoo which was a contravention of a provision of the National Employment Standards.

14 It was also established by the admission of matters in the statement of claim that Mr Wright was responsible in full or in part for decisions relating to the dismissal of Ms Veeraragoo. He knew that the steps described above were to be taken and did nothing to stop Goldbreak from so acting. In particular, Mr Wright had knowledge of the dismissal of Ms Veeraragoo and the reasons for her dismissal because, firstly, he was a person who had the conversation with Ms Veeraragoo on 13 October 2017 about cancelling her visa; secondly, the letter dismissing Ms Veeraragoo was sent three days later and, by its content, appears to refer to the earlier conversation; and thirdly, the letter refers to a conversation with 'the GM' which I take to be a reference to the general manager, namely, Mr Wright.

Mr Wright 'involved in' relevant conduct

15 A person involved in a contravention of a civil remedy provision of the *Fair Work Act* is taken to have contravened that provision (see s 550(1)). As to the meaning of the words 'involved in', they are statutorily defined in s 550(2). The effect of those provisions was

considered in *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87 where the Court said (at [26]), that liability under the accessorial provisions of the *Fair Work Act* depends upon the accessory associating himself or herself with the contravening conduct and the accessory being implicated or involved in the contravention: see also *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 at [253].

16 In *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 at [118], Flick J adopted the following statement by Le Miere J in *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* [2006] WASC 144 at [29]:

To be involved in a contravention requires that the person have a practical connection with the contravention. However, it is not necessary that the person physically do anything to further the contravention. It is sufficient if the person, by what he said and agreed to do, in fact became associated with and thus involved, in the relevant sense, in the conduct constituting the contravention.

17 I am satisfied that, based on the admissions, Mr Wright was involved in the conduct of Goldbreak for the purposes of s 550(1).

18 As to formal matters, I note that the application was accompanied by the certificate required under s 368 of the *Fair Work Act* as to all reasonable attempts to resolve the dispute and Ms Veeraragoo has standing to seek the relief.

Conclusion

19 On the basis of the matters I have stated, I am satisfied that Mr Wright has contravened the following provisions of the *Fair Work Act* by being involved in the conduct of Goldbreak in the following respects:

- (1) s 352, by dismissing Ms Veeraragoo from her employment because she had been temporarily absent from work due to illness or injury of a kind prescribed under the regulations;
- (2) s 44(1), by failing to give Ms Veeraragoo a copy of the Fair Work Information Sheet;
- (3) s 44(1) and s 323(1), by failing to pay accrued annual leave in full;
- (4) s 50, by failing to pay Ms Veeraragoo her salary for the period 1 to 15 October 2017 as required by the agreement; and
- (5) s 50, by failing to pay Ms Veeraragoo two weeks pay in lieu of notice as required by the agreement.

20 In addition, it is claimed that there was a misleading statement to Ms Veeraragoo about her personal leave absence being an abandonment of her employment and a breach of the *Fair Work Act*. There is in the statement of claim an allegation that a representation of that kind was made by the dismissal letter provided to Ms Veeraragoo. That claim is deemed to be admitted for the purposes of the present application. I take the view that it is an admission as to the factual matter, namely, the nature of the representation conveyed by the letter. On that basis I am satisfied that there has been a contravention in relation to that conduct also.

21 I am satisfied that having regard to the nature of the conduct, declarations are appropriate because of their deterrent effect.

Form of declarations and orders

22 The minute of proposed orders sought by Ms Veeraragoo reflects the terms of relief described in the statement of claim by reference to the application, save for two matters:

- (1) one of the declarations concerns the failure to pay salary for a specified period. In error, the orders sought in the application referred to s 45 of the *Fair Work Act* when the relevant provision is s 50; and
- (2) an amendment is sought to the statement of claim to particularise certain amounts that are sought by way of compensation.

23 As to the first matter, it is truly a typographical error that was apparent on the face of the statement of claim because the terms of the declaration sought made clear the specific conduct that was said to amount to a contravention. Accordingly, no amendment is required in order to move for judgment in terms that allow for the typographical error.

24 As to the second matter, in my view, default judgment cannot be sought in terms that depart from the relief sought in the statement of claim as served on Mr Wright. An application is made to amend, but I would not allow that application in order for the nature of the claim to be changed and then default judgment to be sought on the amended claim. The default that has occurred by Mr Wright is in respect of the claim that was personally served upon him and relief should be confined to that claim. Therefore, as to loss and damage, any relief must be in terms of judgment in an amount to be assessed.

25 Finally, I note that the application was commenced one day out of time. Compliance with time limits would have been a matter for Mr Wright to raise by way of defence. By reason of

his default, he has not done so. An order is sought extending time and, to the extent necessary, I grant an extension of time to enable the application to be brought.

26 Otherwise, I will make orders substantially in terms of the minute allowing for the matters I have stated. There will need to be directions for loss and damage to be assessed.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin.

Associate:

Dated: 1 August 2018