

CASENOTE: *Dabboussy v Australian Federation of Islamic Councils* [2024] FCA 1074 (17 September 2024)

The Applicant (also '**Employee**')¹ was the CEO employed from September 2023 to 4 September 2024 by the Respondent (also '**AFIC**'). AFIC is a not-for-profit association, with an Executive Committee. The Executive Committee's powers include the power to terminate the employment of the CEO as well as other employees.

Background –complaint directed at the Employee

In late July 2024 a member of AFIC's staff wrote to the President of AFIC, Dr Jneid, complaining of sexual harassment by the Employee. The complaint was to the effect that some of the Employee's utterances amounted to that harassment. On 9 August 2024, Dr Jneid wrote to the Employee, standing him down from his duties. An investigation followed. On 3 September, the Executive Committee terminated the Employee's employment summarily.

The Employee brought an injunction application in the Federal Court, alleging that AFIC had engaged in 'adverse action' within the meaning of the FW Act. He alleged that he:

- a. had made a complaint on 12 August 2024 ('**12 August Complaint**') in relation to the decision of AFIC to stand him down and to investigate allegations of sexual harassment made against him; and
- b. had a future entitlement from 4 September 2024 to bring an unfair dismissal claim under the *Fair Work Act* 2009 (Cth) ('**FW Act**') in the Fair Work Commission.

A. Nature of complaints, Applicant's 12 August Complaint and Respondent's response

The nature of the Employee's application was a claim alleging adverse action involving dismissal within the meaning of section 342 of the FW Act. In response to the 9 August letter from AFIC, the Applicant, in his 12 August Complaint:

- (a) complained that he did not have access to the terms of the allegation made;
- (b) complained that the 9 August letter did not detail how the Applicant might respond to allegations in respect of his conduct; and
- (c) requested copies of the complaint and related materials relating to the investigation into the complaint, in order to respond.

The Executive Council of AFIC met late on 2 September 2024, in what was described as 'an emergency meeting' concentrating on the complaint against the Employee. At the meeting, AFIC was presented with draft findings from the external investigation which concluded (in the words of Dr Jneid) that the complaint was substantiated.

B. Consideration of interlocutory injunction application

Justice Nicholas of the Federal Court of Australia heard the application for injunction by the Employee. His Honour:

¹ The application brought was under Rule 7.01 of the *Federal Court Rules* 2011. For this reason, the correct description of the Applicant is 'prospective' applicant; for brevity I call the parties 'Applicant' and 'Respondent' in this casenote.

- noted that the Employee asserted complaints and inquiries constituted an exercise of his workplace rights, and related to information not passed to the Australian Charities and Not-for-Profits Commission, or 'ACNC' (which regulates charities such as AFIC). His Honour did not consider the Employee's case based on a complaint regarding the ACNC to be strong;
- found that no basis existed for inferring that the 12 August Complaint was a reason for the termination of the Employee's employment. In effect, Nicholas J found this aspect of the Employee's claim was weak; and
- considered that there was a strong prima facie case for one workplace right. This was the contention that a reason for terminating the Employee's employment on 3 September 2024 included the fact that he had an entitlement from 4 September 2024 to bring an unfair dismissal application, due to either section 23 or to the Small Business Dismissal Code, both contained in the FW Act. The Code provides that "[s]mall business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement" including under section 382 and the definition of "minimum employment period" in section 383(b) of the FW Act. Thus:
 - the 3 September Executive Committee meeting was arranged with haste – when the investigator's report was not finalised; and the Employee had already been stood down. There was no explanation for the need to consider draft findings with such haste; and
 - absent evidence, a strong inference was available that the Executive Committee was convened by Dr Jneid for the purpose of terminating the Employee's employment in the hours before 4 September 2024, so as to prevent the Employee bringing an unfair dismissal claim under Part 3-2 of the FW Act.

Nicholas J found that in accordance with the High Court decision in Qantas v TWU,² the termination of the Employee was for the substantial and operative reason of depriving him of the right to make a claim for unfair dismissal. His Honour found a serious issue to be tried on the Employee's injunction application, and (after balancing the effect of the order, including concerning difficulties of the Employee finding alternative employment), ordered reinstatement of the Employee's employment pending trial.

Rationale of the decision

This decision gives two things: *first*, it is a practical demonstration of how the 'future workplace rights', found by the plurality in Qantas v TWU, may fall for consideration in the future. This expanded notion of workplace rights has altered the landscape in general protections claims. Since the Employee's financial situation had an effect on the balance of convenience³ the rationale of this case must be limited – in the sense that such another judge may have given less weight to the balance of convenience on the Applicant's side. The second aspect of this case is the breadth of possible orders under section 545 of the FW Act – whilst interlocutory reinstatement is unusual, it is a possibility under that section.

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² Qantas Airways Ltd v Transport Workers Union of Australia [2023] HCA 27; (2023) 412 ALR 134 at [6] per Kiefel CJ, Gageler, Gleeson and Jagot JJ.

³ The Employee gave evidence, apparently accepted by Nicholas J, that if not reinstated he would be forced to sell his family home: [25]. Whilst this does not amount to evidence of 'damages not being an adequate remedy, acceptance of this evidence is a significant factor for the bells of convenience.