Federal Court of Australia

Qantas Airways Limited v Transport Workers’ Union of Australia [2021] FCA 1136

|  |  |
| --- | --- |
| File number(s): | NSD 927 of 2021 |
|  |  |
| Judgment of: | **PERRAM J** |
|  |  |
| Date of judgment: | 21 September 2021 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – application for a stay of proceedings – whether proceedings should be stayed pending the determination of the applicant’s leave application – where stay of proceedings would diminish the relief available to the respondent – where proceedings are bifurcated between liability and relief |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) s 340(1)(b)  *Federal Court Rules 2011* (Cth) r 35.13 |
|  |  |
| Cases cited: | *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685  *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 67 FCR 65  *Transport Workers’ Union of Australia v Qantas Airways Limited* [2021] FCA 873  *Transport Workers’ Union of Australia v Qantas Airways Limited (No 2)* [2021] FCA 1012 |
|  |  |
| Division: | Fair Work Division |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 15 |
|  |  |
| Date of hearing: | 20 September 2021 |
|  |  |
| Counsel for the Applicant: | Mr B Walker SC with Mr T Prince |
|  |  |
| Solicitor for the Applicant | Herbert Smith Freehills |
|  |  |
| Counsel for the Respondent: | Mr N Hutley SC with Mr M Gibian SC and Mr P Boncardo |
|  |  |
| Solicitor for the Respondent | Maurice Blackburn Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 927 of 2021 |
|  | | |
| BETWEEN: | QANTAS AIRWAYS LIMITED (ACN 009 661 901)  Applicant | |
| AND: | TRANSPORT WORKERS’ UNION OF AUSTRALIA  Respondent | |

|  |  |
| --- | --- |
| order made by: | PERRAM J |
| DATE OF ORDER: | 21 SEPTEMBER 2021 |

THE COURT ORDERS THAT:

1. The Applicant’s stay application, filed 13 September 2021, be refused.
2. Costs are to be costs in the application for leave to appeal.

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

REASONS FOR JUDGMENT

PERRAM J:

1. The question which arises on the present application is whether Qantas Airways Ltd should be granted a stay of the proceedings which are currently pending against it before a judge of this Court until its application for leave to appeal from that judge’s finding that it has infringed s 340(1)(b) of the *Fair Work Act 2009* (Cth) (‘the Act’) has been determined. The trial judge found that Qantas had breached that provision by outsourcing its ground handling and fleet presentation operations to third party operators and, in effect, terminating the employment of all of its employees who had until then been doing that work. Qantas announced this decision on 30 November 2020, had engaged the third party contractors by the end of January 2021 and had brought to an end the employment of the ground handling and fleet presentation employees by no later than 31 March 2021.
2. The Transport Workers’ Union (‘the TWU’), which represents the former employees, puts its case broadly in this way: it submits that the nominal expiry date for the collective agreements which covered these employees was approaching. It argues that the reason that Qantas had outsourced the operations to the third party operators was to prevent the employees from engaging in industrial action during the negotiations for any new collective agreement. In effect, it says that Qantas took advantage of the COVID-19 pandemic to restructure its workforce during a period when the threat of industrial action was largely meaningless. Qantas, on the other hand, says it was faced with an unprecedented crisis and radically had to restructure its operations in response. This is a somewhat abbreviated account of the dispute, but it will do for the purposes of this application.
3. The trial judge accepted the TWU’s case that Qantas’ decision had been made for the reason alleged and that it constituted unlawful ‘adverse action’ within the meaning of s 340(1)(b) of the Act: *Transport Workers’ Union of Australia v Qantas Airways Limited* [2021] FCA 873 at [287]-[288]. Following further argument his Honour then granted, on 25 August 2021, declaratory relief to give effect to that conclusion: *Transport Workers’ Union of Australia v Qantas Airways Limited (No 2)* [2021] FCA 1012. The TWU had sought a raft of other orders relating to reinstatement and compensation, but at an early stage of the proceedings it had been determined that the question of whether s 340(1)(b) had been infringed would be determined in advance of the other issues. Again, this is an overly simplified description of a much more procedurally complicated piece of litigation but it will suffice for present purposes.
4. The trial judge has now made extensive directions to bring the balance of the case on for trial as soon as possible. The trial of the remaining issues will be complex and expensive given the number of employees involved and the fact that claims are made for losses suffered by them. In some ways, it resembles class action litigation. However, the most important aspect of the matters which are yet to be tried concerns whether the former employees should be reinstated to their positions.
5. The problem on the present application shortly stated is this: if the proceeding (including the claim for reinstatement) is stayed and Qantas’ appeal on the question of whether it infringed s 340(1)(b) is unsuccessful, then the relief to which the TWU will be entitled will be diminished by the delay which has ensued. In particular, the TWU says that the longer that the former employees wait to be reinstated, the more likely it is that they will have found other work. Further, whether reinstatement orders are made will very much turn upon the practical realities on the ground. One of those practical realities is that the third party operators are already performing the work which was being done by the former employees. Any reinstatement of the former employees will have contractual consequences for those operators (and also for Qantas). Reinstatement is also likely adversely to impact the employees of the third party operators. For example, it is not difficult to foresee Qantas submitting that it should not be put in the position of having to employ two sets of ground handling and fleet presentation employees. Further, whilst the aviation sector might be somewhat subdued at the moment, this may soon change. Mr Hutley SC, for the TWU, submitted that this had the consequence that the possibility of reinstatement orders being made might be more likely at the moment when the third party operators had not yet established substantial businesses, but less likely as the aviation sector regains momentum.
6. Considerations of this kind are of course, to an extent, speculative in nature. However, it seems to me that they are legitimate concerns. I therefore accept Mr Hutley’s submission that the timely determination of the reinstatement case by the trial judge is an important matter. A delay in its determination presents the TWU, which has succeeded at trial on its argument that s 340(1)(b) of the Act was infringed, with a non-trivial risk that the relief to which it may ultimately be entitled will be diminished by the passage of time.
7. Turning then to the issue of whether a stay should be granted, it seems to me that the following matters are pertinent to the exercise of the discretion.
8. *First*, I accept that the application for leave to appeal discloses arguments of substance. It was said against this by Mr Hutley that the trial judge’s determination had been based to an extent on questions of the credit of Mr David, the person who made the decision to outsource the operations and to terminate the employment of the ground handling and fleet presentation employees. No doubt, this is true. However, there is more to Qantas’ proposed appeal than mere complaint about the findings which the trial judge made about the credit of Mr David. For example, Qantas contends that the work place rights which the trial judge acted upon (the right to engage in industrial action leading up to the renegotiations of the collective agreements) did not actually exist at the time Mr David took the steps he did. Qantas says that it cannot be adverse action under s 340(1)(b) of the Act to take a step to prevent the exercise of a workplace right which does not yet exist. Without expressing a concluded view on it, I regard this argument as having some substance.
9. *Secondly*, for the reasons I have already given, I accept that any delay in the trial of the reinstatement aspect of the case will be prejudicial to the TWU. There is a real risk that the relief to which it will be entitled will be imperilled the longer that it takes to determine the question of reinstatement.
10. *Thirdly*, I accept that if the stay is not granted and Qantas is ultimately successful in its appeal, then it too will suffer irremediable prejudice. It will be forced to expend substantial funds in the preparation of a case for hearing which will have been unnecessary. In industrial proceedings of the present kind, these costs are not able to be recovered from the opposing party. Allied to that is the amount of executive time that will need to be devoted to any appeal, a matter which I take to be exacerbated by the circumstances of the pandemic.
11. *Fourthly*, it is relevant that the hearing was bifurcated into a hearing on liability and a hearing on the relief that should be granted. Generally, the bifurcation of proceedings is procedurally risky although it is not uncommon in certain kinds of case. The risk of bifurcation includes the risk that two rounds of appeals will be generated. For example, in this case if Qantas loses its appeal on liability and then goes on to lose the trial on reinstatement, it may yet win an appeal on reinstatement at a later date. On balance, whilst I accept that the fragmentation of proceedings, including appellate proceedings, is undesirable I regard it as a fairly neutral matter in this case. The cause of the fragmentation is the bifurcation, which has already occurred.
12. *Fifthly*, I do not accept the submission made on behalf of the TWU that Qantas has been tardy in making its application for leave to appeal and then for a stay. The declaration was granted on 25 August 2021. Assuming Qantas was required to seek leave to appeal, it was required to file that application within 14 days of that declaration being made: r 35.13 of the *Federal Court Rules 2011* (Cth). It filed that application on 7 September 2021 and the present stay application on 13 September 2021. Whilst I accept that this could probably have been done a little faster, I do not think that in the scheme of the events taking place in this substantial litigation (which have involved intensive hearings before the trial judge for the preparation of the next phase of the trial) any delay is relevantly material.
13. How should these conflicting considerations be resolved? The mere filing of an application for leave to appeal does not entitle a party to a stay of the trial judgment for the opposing party has succeeded at trial and is entitled to commence with a presumption that the trial judgment is correct. The discretion conferred on the Court to grant a stay is a broad one insusceptible to definitive articulation. But some matters are clear. It is not necessary that special or exceptional circumstances should be shown and the balance of convenience will generally be an important consideration. In an appropriate case, where a stay is justified, it may be necessary to impose terms upon its grant: *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694; *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 67 FCR 65 at 66.
14. I have concluded that the stay sought by Qantas should not be granted. At the forefront of my consideration is my impression that the risk of prejudice to the TWU outweighs the risk of prejudice faced by Qantas. In reaching that conclusion, however, I have taken into account each of the other matters to which I have referred.
15. I turn then to the question of expedition. Without a stay being in place, the risk of prejudice faced by the TWU is no longer present. There remains, however, a risk to Qantas. The longer the application for leave to appeal (and any appeal) takes to determine, the more costs Qantas will incur before the trial judge. This suggests that a degree of expedition is warranted. The current state of the Full Court listings for November 2021 is very tight and I do not think that the situation warrants a hearing in November given the inconvenience that it will generate in other quarters. The application for leave to appeal (and if leave be granted, any appeal) will be listed for hearing in the February 2022 Full Court sittings. Costs will be costs in the application for leave to appeal.

|  |
| --- |
| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram. |

Associate:

Dated: 21 September 2021