SHORT PARTICULARS OF CASES

SEPTEMBER 2014
BRISBANE CIRCUIT

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KUCZBORSKI v. THE STATE OF QUEENSLAND (B14/2014)

Writ of summons filed: 19 March 2014

Date special case referred to the Full Court: 23 June 2014

On 15 October 2013, the Queensland Government introduced into State Parliament three Bills: the *Vicious Lawless Association Disestablishment Bill 2013*, the *Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013* and the *Tattoo Parlours Bill 2013.* Each of the three bills passed in the Legislative Assembly and commenced on 17 October 2013.

The issues are: whether the Plaintiff has standing to obtain declaratory relief in respect of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ("the VLAD Act") and certain impugned provisions of the *Criminal Code* (Qld) ("the Criminal Code") and the *Bail Act 1980* (Qld) ("the Bail Act"); whether the relief that the Plaintiff seeks in respect of the VLAD Act and certain of the impugned provisions would be hypothetical; and whether the VLAD Act and the rest of the impugned provisions are invalid for infringing the principle identified in *Kable v Director of Public Prosecutions (NSW)* ("the *Kable* principle").

The Plaintiff is a current member of the Brisbane Chapter of the Hells Angels Motorcycle Club ("HAMC") and a former office bearer of a Sydney Chapter of the HAMC. The HAMC is declared to be a "criminal organisation*"* for the purposes of the Criminal Code and the *Crime and Corruption Act 2001* (Qld).

The Plaintiff contends that the VLAD Act and various aspects of the amendments made to the Criminal Code and other legislation by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* and the *Tattoo Parlours Act 2013* and which may apply to him as a *"participant in the affairs of an association"* and a member of a deemed "*criminal organisation"* offend the Kable principle and are thereby invalid.

A notice of constitutional matter was filed by the plaintiff on 25 March 2014. The Attorney-General of the Commonwealth and the Attorneys-General for Victoria, Western Australia, South Australia, Northern Territory and New South Wales are intervening.

The questions stated in the Further Amended Special Case for the opinion of the Full Court include:

- Does the plaintiff have standing to seek a declaration that any, and which, of the provisions referred to in the schedule to these questions (other than the Criminal Code sections 60A, 60B(1) and 60C and the *Liquor Act 1992* (Qld) sections 173EB to 173ED) is invalid?

- Is the relief which the plaintiff seeks in answer to question 3 (other than the relief sought in relation to the Criminal Code sections 60A, 60B(1) and 60C and *Liquor Act 1992* (Qld), sections 173EB to 173ED) hypothetical?

- Is any, and which, of the provisions referred to in the schedule invalid on the ground that it infringes the Kable principle?

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v. BHP COAL PTY LTD (B23/2014)

Court appealed from: Full Court of the Federal Court of Australia [2013] FCAFC 132

Date of judgment: 13 December 2013

Date of grant of special leave: 16 May 2014

In May 2012, BHP Coal Pty Ltd ("the respondent") terminated the employment of Mr Henk Doevendans after 24 years of service. Mr Doevendans, who was a member of the Construction, Forestry, Mining and Energy Union ("the appellant") and a representative on one of its committees, had participated in industrial action three months earlier at the respondent's Saraji Mine. During protests against workers driving to the mine within a stop-work period, Mr Doevendans repeatedly held up a sign that read "*SCABS – no principles – no guts*" ("the Sign").

The appellant commenced Federal Court proceedings against the respondent under the *Fair Work Act 2009* (Cth) ("the FW Act"), claiming that the company had dismissed Mr Doevendans unlawfully on account of his participation in industrial action and/or his role as an officer of the appellant. During the trial Mr Geoff Brick, the general manager of the Saraji Mine, gave evidence that Mr Doevendans' employment had been terminated because his repeated waving of the Sign over three days amounted to harassing behaviour that was contrary to both the respondent's conduct policy and the culture being developed at the Saraji Mine. Mr Brick also believed that Mr Doevendans' antagonistic behaviour was unlikely to change.

On 7 November 2012, Justice Jessup ordered the respondent to reinstate Mr Doevendans to his position (as a machinery operator) at the Saraji Mine. His Honour found that the respondent had contravened s 346(b) of the FW Act by taking adverse action against Mr Doevendans because he had engaged in industrial activity. That activity was of two types. The first, in line with s 347(b)(iii) of the FW Act, was Mr Doevendans' participation in a lawful activity organised by the appellant, as his behaviour which the respondent had taken into account included his waving of the Sign during protests that were a part of that activity. The second type of industrial activity, under s 347(b)(v), was Mr Doevendans having advanced the interests of the appellant by holding up the Sign in an effort to prevail upon other workers at the mine to join in the stoppage of work.

On 13 December 2013, the Full Court of the Federal Court (Dowsett and Flick JJ; Kenny J dissenting) allowed the respondent's appeal. The majority held that Justice Jessup's finding of contravention by the respondent could not stand, as it was inconsistent with his Honour's acceptance of evidence given by Mr Brick that the industrial activity of Mr Doevendans had played no part in the decision to terminate his employment. Justice Kenny however held that it was open on the evidence for Justice Jessup to find that the respondent had contravened s 346(b) of the FW Act by reference to the criterion of s 347(b)(v). This was because the message on the Sign represented the view of the appellant (which had produced signs and stickers bearing similar messages), a view which Mr Doevendans had advanced by holding the Sign up during protests.

The grounds of appeal include:

- In the circumstances of the instant case where:

    - the employee was dismissed for holding up a sign whilst attending a lawful and peaceful protest organized by an industrial association;
    - the sign was one of a number purchased by the industrial association for the purpose of the protest;
    - the industrial association encouraged attendees at the protest to hold up the signs; and
    - the sign held by the employee bore words which expressed the views and interests of the industrial association;

  the Full Court erred in finding that, in dismissing the employee for holding the aforementioned sign at the aforementioned protest, the employer did not dismiss the employee because he participated in a lawful activity organised or promoted by an industrial association, within the meaning of s 346(b) and s 347(b)(iii) of the FW Act.