SHORT PARTICULARS OF CASES

JUNE/JULY 2020

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PRIVATE R v COWEN & ANOR (S272/2019)

Date application for a constitutional or other writ filed: 13 September 2019

Date application referred to Full Court: 3 March 2020

Private R is a soldier who has been a member of the Australian Defence Force ("the ADF") since 2006. In June 2019 he was charged with assault occasioning actual bodily harm ("the Charge") by the Director of Military Prosecutions, under s 61(3) of the *Defence Force Discipline Act 1982* (Cth) ("the DFD Act") and s 24(1) of the *Crimes Act 1900* (ACT). The Charge followed an investigation by military police of a complaint made by the alleged victim ("the Complainant"), who was also a member of the ADF at the time of the alleged incident.

The alleged offence is said to have occurred in a Brisbane hotel room in August 2015, soon after Private R and the Complainant had attended a social event in the hotel. Both persons were off duty and out of uniform at the time. (Private R and the Complainant previously had been in an intimate relationship, prior to the Complainant's joining the ADF.)

On 26 August 2019 a Defence Force Magistrate ("DFM"), Brigadier Michael Cowen, overruled an objection by Private R that he (the DFM) lacked jurisdiction to hear the Charge.

Private R then applied to this Court for the issuance of a writ of prohibition to Brigadier Cowen, prohibiting him from proceeding on the Charge. Private R contends that s 61(3) of the DFD Act does not validly confer jurisdiction on service tribunals to try criminal charges during peacetime where civilian courts are available. This is on the basis that s 61(3) of the DFD Act cannot be supported by the relevant head of power in the Constitution, s 51(vi), because s 61(3) is not reasonably appropriate or adapted to the maintenance of service discipline.

Brigadier Cowen filed a submitting appearance, after which the Commonwealth of Australia was joined, with the consent of Private R, as a defendant to the proceeding.

The Commonwealth submits that s 61(3) is wholly valid, it being open to the Parliament to decide that any crime by a member of the ADF reflects on the person's fitness to serve and more broadly on the discipline in and the reputation of the ADF.

The application was referred by Justice Edelman for consideration by a Full Court, upon a statement of facts agreed by the parties.

A Notice of a Constitutional Matter was filed by Private R. At the time of writing, no Attorney-General had intervened in the proceeding.

MONDELEZ AUSTRALIA PTY LTD v AMWU & ORS (M160/2019); MINISTER FOR JOBS AND INDUSTRIAL RELATIONS v AMWU & ORS (M165/2019)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 21 August 2019

Special leave granted: 17 December 2019

The appellant ("Mondelez") is a national system employer and operates food manufacturing plants in Australia, including a Cadbury plant in Tasmania. The Australian Manufacturing Workers Union ("AMWU") is a trade union which represented Mondelez' workers.

Under the relevant enterprise agreement, Mondelez employees who work 12-hour shifts were entitled to 96 hours of paid personal leave per annum. Consequently, when a 12-hour shift worker takes a day of personal/carer's leave, 12 hours are deducted from their leave balance. On this approach, for one year of service, an employee who works three 12-hour shifts would have sufficient leave to cover eight days absent from work under the enterprise agreement.

A dispute arose between Mondelez and AMWU about whether the above method for calculating personal leave is consistent with s 96 of the *Fair Work Act 2009* (Cth) ("the Fair Work Act"). Relevantly, s 96 of the Fair Work Act states:

- For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.
- An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

The Fair Work Act states that a term in an award, agreement or employment contract cannot provide for an entitlement that is less than an entitlement set out in the National Employment Standards.

Mondelez argued that their enterprise agreement was consistent with s 96 of the Fair Work Act, as under s 96 employees would only be entitled to 72 hours of leave per year whereas the enterprise agreement entitled employees to 96 hours of paid personal/carer's leave. AMWU argued that, as the employees worked 12-hour shifts, they should be entitled to 10 days of 12 hours of paid leave, totalling 120 hours a year, and that anything less would be inconsistent with s 96 of the Fair Work Act.

Mondelez filed an application seeking declaratory relief in the original jurisdiction of the Federal Court of Australia. Pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) the Chief Justice directed that the jurisdiction of the Court be exercised by a Full Court on the basis that the matter is of sufficient importance to justify that course.

The then Minister for Jobs and Industrial Relations intervened in the proceeding pursuant to s 569 of the Fair Work Act.

The majority of the Full Federal Court (Bromberg and Rangiah JJ; O'Callaghan J dissenting) determined that full-time and part-time employees are entitled to 10 working days of paid personal/carer's leave for each year of employment. The leave protects those employees' income when they are entitled to be absent from work due to illness or injury (or providing care or support to a family or household member who is ill, injured or suffering from an unexpected emergency).

The Court also determined that the leave must be calculated in working days, not hours. A working day is the portion of a 24 hour period that an employee would otherwise be working. An employee's entitlement is based upon time working for the employer and is expressly calculated in days. For every day of personal/carer's leave taken, an employer deducts a day from the employee's accrued leave balance. If an employee takes a part-day of leave, then an equivalent part-day is deducted from the employee's accrued leave balance.

The grounds of appeal are:

- The Full Court erred by holding that a "day" in s 96(1) of the Fair Work Act means "the portion of a 24 hour period that would otherwise be allotted to work", rather than an average working day calculated as the employee's average daily ordinary hours of work based on a standard five-day working week; and
- The Full Court erred in construing s 96(1) of the Fair Work Act as entitling national system employees (other than casuals) to paid personal/carer's leave equivalent to 10 'working' days (of whatever duration would have been worked on the day in question), per year of service.