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Registrar

Important Information

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Form 4
Rule 4.03

Outline of submissions of the first respondent

No. VID44 of 2023

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

Sally Rugg

Applicant

The Commonwealth of Australia and another

Respondents

Introduction

1. By an originating application dated 25 January 2023, the Applicant (**Ms Rugg**) applies for urgent interim interlocutory relief (**the Application**).[1] In practical terms, Ms Rugg moves the Court for interim relief to restrain[2] the First Respondent (**Commonwealth**) from terminating her employment. It appears she wishes to preserve and maintain a personal services employment relationship between herself and the Commonwealth, or more particularly, the Member of Parliament for whom she works, the Second Respondent (**Dr Ryan**).
2. Ms Rugg's relevant cause of action is that she fears (the harm) that such termination '*would contravene s.340 of the Fair Work Act 2009 (Cth)*' (**FW Act**).[3]
3. The Application now made by Ms Rugg is made 35 days after she issued a letter of resignation to Dr Ryan/the Commonwealth and thereafter sat mute. No allegation of unlawfulness was made on 21 December 2022 or for 35 days thereafter. The Rugg letter of resignation has not been rescinded. It was accepted by Dr Ryan on 22 December 2022.
4. If such interim relief as is sought were granted by this Court, it will require that:

[1] Originating Application dated 25 January 2023 at page 4 at 1
[2] Letter from Maurice Blackburn to Federal Court of Australia Registry dated 25 January 2023 at [3]
[3] Originating Application dated 25 January 2023 at 1

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a) the Commonwealth continue to afford Ms Rugg all her terms, conditions and emoluments attaching to employment– to keep paying her wages and ensure she receives all other entitlements; and

b) Dr Ryan be compelled by a coercive court order to continue to receive the labour/services supplied to her by Ms Rugg as Chief of Staff, her most senior employee; to engage with Ms Rugg on a personal level in employment where Dr Ryan [reasonably] believes she can no longer do so.

5. There are certain premises suppressed in the Application now urgently made by Ms Rugg. Some of them are:

   a) that by 21 December 2022 there was a functional, and functioning employment relationship between her and Dr Ryan that was other than terminal; that could be saved/salvaged;

   b) that the necessary confidence which must inhere in an employment relationship remained extant in December 2022 even though Ms Rugg drafted and sent a letter of resignation bringing that employment to a close; and

   c) that, in reality, there was some functional vestige of a barely 5 month old working relationship that could somehow survive into the future (or be revived) in the intense atmosphere of a parliamentary working life.

6. In practical reality, Ms Rugg urges this Court to preserve a fractured, troubled, and likely terminal, working relationship between a Member of Parliament and a Chief of Staff.

7. The Commonwealth will urge the Court to scrutinise closely the practical effect of any such proposed interim order. The Court should not intervene to preserve an employment relationship that, as can happen, failed to take root. If there were any conduct by any person in contravention of the FW Act, compensation and perhaps civil penalties will follow. Final relief in the form of reinstatement or continuing employment is a remote prospect in all the particular circumstances.

Summary: the Commonwealth opposes the urgent relief

8. The Commonwealth opposes the Application for interim relief. The parties should not be ordered to maintain a close personal working relationship, in a [four] 4 person workplace, on an indefinite basis, even in the short term. There is no utility in such a course.

9. Absent a complaint of economic duress or impending penury, there is no compelling basis to preserve a relationship which, after its initial phase, has proved itself to be unworkable. If an order were made, there is a risk the Court will have to supervise that relationship.

Power and organising principles

10. The Court has power to grant the injunctive relief sought, both under the principal enactment and upon the power reposed in it by the FW Act.

11. In *Construction Forestry Mining and Energy Union v Anglo Coal (Capcoal Management) Pty Ltd*[4] the Court observed that:

> *"….the Court has jurisdiction to make interlocutory orders including reinstatement, if not under s 545 of the FW Act, then under s 23 of the Federal Court of Australia Act 1976 (Cth), which gives the Court power to make such orders (including interlocutory orders) as it thinks appropriate. Save for the question of competency, Capcoal did not submit otherwise. Like the equivalent provision under the Workplace Relations Act 1996 (Cth) (the WR Act) (s 298U) s 545 is not exhaustive of the remedies that may be afforded to a successful party, on a final or interim basis*."[5]

12. Section 361(1) of the FW Act (reason presumed) does not apply in relation to orders for an interim injunction: s.361(2) of the FW Act.

13. There is an established orthodoxy in respect of the adjudication of an application for urgent interim relief.[6] The applicant for relief must persuade the court in respect of the following:

    a) the applicant has established, to the satisfaction of the Court, that there is a *prima facie* cause of action for final relief; and

    b) whether the balance of convenience (that is to say, the inconvenience to the respondents that injunctive relief might visit, measured against the inconvenience to the applicant if such relief is declined) — favours the relief that is sought.[7]

14. On the question of 'prima facie case', Justice Beach has observed:

> "*It is necessary to show a sufficient likelihood of success to justify the grant of the injunction, with such sufficiency being dependent upon the nature of the right being asserted and the practical consequences that are likely to flow if an injunction was granted*."[8]

15. On the question of 'balance of convenience', His Honour has observed:

> *"The balance of convenience looks at what the inconvenience, injury or injustice to the plaintiff would be if the injunction were refused and seeks to weigh that against the inconvenience, injury or injustice to the defendant if the injunction were granted. Only if the balance lies in favour of the plaintiff, that is,*

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[4] [2016] FCA 1582; (2016) 266 IR 185

[5] (2016) 266 IR 185; see also, for example, *Trego v Wesbeam* [2019] FCA 1030; *Maritime Union of Australia v Sydney International Container Terminals Pty Ltd* [2015] FCA 855: the interim injunction restrained the employer from terminating employment in circumstances where the issue arose in the context of an alleged breach of an enterprise agreement: see s 50 of the FW Act. The employees concerned had not yet ceased employment; and *Australian Education Union v Royal Melbourne Institute of Technology* [2018] FCA 1985 at [37] per Wheelahan J.

[6] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57

[7] *Kelly v Noonan* [2021] FCA 146 at [20]; *Briant v Martin* [2020] FCA 1009 at [19]–[22]

[8] *Armstrong World Industries (Australia) Pty Ltd v Parma* [2014] FCA 743 at [24]

> *if the inconvenience, injury or injustice to the plaintiff if the injunction were refused outweighs the defendant's prejudice would an injunction be granted*."[9]

16. The question of appropriateness of damages/compensation is often subsumed into the balance of convenience considerations.
17. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Bluestar Pacific Pty Ltd*[10] Greenwood J stated that in order to warrant the exercise of the Court's discretion to grant interim reinstatement, the applicant must show *"a sufficient likelihood of success in the principal proceeding at trial to justify, in the circumstances, the preservation of the status quo [strictly, the status quo ante] pending the trial".*
18. When considering the grant of interim relief, the issue of whether an applicant has established a *prima facie* case and whether the balance of convenience favours relief are related inquiries. Whether there is a *prima facie* case is to be considered together with the balance of convenience.[11]
19. In this Application, it appears Ms Rugg seeks an order by way of prohibition, to restrain the termination of employment. However, it appears the effect of the order is also to compel the Commonwealth and Dr Ryan to continue to employ Ms Rugg on her usual terms and conditions. In that sense, the ultimate order may be 'mandatory' in nature. In any event, the governing principles remain the same.

The basic facts

20. Ms Rugg was employed by Dr Ryan for and on behalf of the Commonwealth pursuant to Part III and Part IV of the *Members of Parliament (Staff) Act 1984* (Cth) (**MOPS Act**).
21. The employment relationship was regulated by the following:
    a) the MOPS Act;
    b) the *Commonwealth Members of Parliament Staff Enterprise Agreement 2020 – 2023* (**the Enterprise Agreement**);
    c) written contract of employment (**the Contract**);[12] and
    d) the common law.

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[9] Ibid at [42]
[10] [2009] FCA 726; 184 IR 333
[11] *Samsung Electronics Co Ltd v Apple Inc*. (2011) 217 FCR 238 at 261 [67] (Dowsett, Foster and Yates JJ). In *Bullock v FFTSA* (1985) 5 FCR 464 , Woodward J (with whom Smithers and Sweeney JJ relevantly agreed) stated (at 472):"…*an apparently strong claim may lead a court more readily to grant an injunction when the balance of convenience is fairly even. A more doubtful claim (which nevertheless raises "a serious question to be tried") may still attract interlocutory relief if there is a marked balance of convenience in favour of it.*"
[12] SR-2 to the Rugg Affidavit

22. Prior to commencement in the role, Ms Rugg was provided with a position description **(PD**) which recorded *Pay and Conditions* including:
    a) the position was offered under the MOPS Act and the Enterprise Agreement; and
    b) she was to paid a *Parliamentary Staff Allowance* in recognition of, and compensation for, reasonable additional hours of work.[13]
23. The employment commenced on or about 25 July 2022.
24. By 15 November 2022, there had been a discussion about progress and the employment relationship. Ms Rugg recorded in an email that she found it 'confusing and upsetting'.[14] A performance review was suggested. Dr Ryan considered that was a good idea.
25. On 6 December 2022, there was a meeting to discuss performance issues. Dr Ryan spoke of preparing a 'warning letter' in relation to Ms Rugg's conduct in employment. Ms Rugg recorded that this was a second occasion upon which Dr Ryan had raised termination of Ms Rugg's employment. Ms Rugg asserted she did not want to resign and did not want to have her employment terminated.[15]
26. At 5.15pm on 21 December 2022, Dr Ryan and Ms Rugg met again.[16] There was further disagreement and rancour. Dr Ryan is alleged to have characterised the relationship as '*broken beyond repair'*.[17] On any measure, the employment relationship had soured considerably.
27. Ms Rugg sent her letter of resignation on 21 December 2022. The employment relationship had, at that time, endured for about 5 months. In her own words, Ms Rugg refers to the '*friction and dispute'* she encountered in the employment relationship.[18]
28. On 21 December 2022, a letter of resignation was issued from Ms Rugg. She resigned 'effective immediately' (**the Resignation**).[19]
29. On 22 December 2022 at 4.58pm, Dr Ryan accepted the Resignation. She confirmed that Ms Rugg's final day of employment would be 31 January 2023.[20] Dr Ryan stated that Ms Rugg was no longer required to attend for duties at the office. Dr Ryan offered herself as a contact for any future reference.
30. Ms Rugg made no further complaint and did not otherwise correspond on the topic of resignation/dismissal until a letter from her solicitors issued on 25 January 2023.

[13] SR-3 to the Rugg Affidavit
[14] SR-7 to the Rugg Affidavit
[15] SR-9 to the Rugg Affidavit
[16] Rugg Affidavit at [71]
[17] Rugg Affidavit at [71](g)
[18] Rugg Affidavit at [26]
[19] SR-16 to the Rugg Affidavit
[20] SR-17 to the Rugg Affidavit

PRIMA FACE CASE

A *prima facie* case for final relief in respect of dismissal adverse action?

31. Ms Rugg must persuade the Court that, *prima facie*, she was dismissed in contravention of the general protections provisions in the FW Act. The case is advanced as one of constructive dismissal. That is the cause of action which necessarily underpins the Application for the interim order – because the relief sought is targeted to that alleged harm – dismissal.
32. Ms Rugg's affidavit draws a detailed and complex landscape in which there are, on any fair view, multiple reasons for the alleged dismissal. The Commonwealth contends upon that affidavit that, even at this early interlocutory juncture, where the evidence is yet to be tested, it is clear the employment relationship was troubled and simply not working out. Dr Ryan was not happy. Ms Rugg became increasingly unhappy. By December 2021, the relationship, albeit only 5 months old, was in its death throes.
33. The *prima facie* case for relief on the allegation of constructive dismissal is weakened by a fair reading of Ms Rugg's affidavit. The relationship had become imperilled by differing expectations and a growing communication gulf between the Ms Rugg and Dr Ryan. Without laying blame anywhere in particular – the relationship was in real trouble.
34. At common law, an employee has a duty to maintain the necessary confidence in the employment relationship by acting loyally and with fidelity.[21]
35. If the sworn evidence puts in issue the durability and future of the working relationship between Dr Ryan and Ms Rugg (and it appears that Dr Ryan has lost confidence in Ms Rugg as an employee), the Court ought move cautiously to reimpose upon the parties a relationship which could result in greater tumult or rancour. Where there is an absence of the necessary trust, confidence or good faith in the employment relationship, the ongoing safety (from harm) of workplace participants may be imperilled.[22]

BALANCE OF CONVENIENCE

Damages are an adequate remedy

36. Section 545 of the FW Act reposes in the Court a sufficiently wide suite of remedies including 'compensation'.
37. If the Commonwealth or Dr Ryan has contravened the FW Act and wrongfully terminated the employment relationship (which is denied), Ms Rugg can be

[21] *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 at 81; *Commonwealth Bank of Australia Ltd v Barker* (2014) 253 CLR 169; (2014) 312 ALR 356 at 376 at [65] per Kiefel J

[22] There are statutory duties imposed on the Commonwealth to provide and maintain a safe workplace for employees and third parties: Work Health and Safety Act 2011 (Cth) (WHS Act). See ss.10, 12 and 17 of the WHS Act

'compensated' on a range of bases including lost remuneration and any pain and suffering she has experienced.

38. Statutory compensation is an adequate remedy in the context of a broken employment relationship and these particular statutory causes of action.[23]

Balance of convenience: ten (10) relevant considerations

39. The balance of convenience heavily favours the dismissal of the Application. There are multiple discretionary considerations militating against the grant of interim relief. An order preserving the employment relationship would likely cause prejudice to Dr Ryan in her role as a Member of Parliament. There is also an even possibility that it would cause prejudice and risk to the Commonwealth in ensuring it maintains a safe workplace.

40. First, a personal services relationship (in a 4 person office/enterprise) has broken down. The necessary trust and confidence in that relationship is arguably lost and likely cannot be revived. Ms Rugg has deposed in her affidavit (noting the use of the past tense):

    a) at [82]: there was once a close personal relationship but that has now gone;
    b) at [83]: in 2022, there were tensions that were challenging;
    c) at [83]: there is not a present functional working relationship; and
    d) at [84]: there is now an absence of a professional and productive relationship (because it must be restored).

41. These candid evaluative assessments (properly made) contained in the Rugg affidavit, weigh heavily in the discretionary assessment.[24] One wonders why, given these observations, Ms Rugg would want to keep alive a failed relationship? The Court must move with caution and be mindful not to enter the fray to try and repair, in a personal services setting, what is now broken.

42. Second, most of any reputational damage to Ms Rugg is done (the media have reported on the matter extensively since 30 January 2023) and that is unlikely to be significantly repaired by any interim order.[25]

43. Third, there is a power in the Court under s.545 of the FW Act to order reinstatement to employment as final relief should it be appropriate upon final determination of the claims in the proceeding. The Court is not constrained by any traditional orthodoxy concerned with final orders as to specific performance of personal services relationships. The Parliament has reposed in the Court a power to use this remedy where appropriate.

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[23] *Russell v Institute of Engineers Australia t/as Engineers Australia* [2013] FCA 1250 at [81]
[24] *Kahu NZ Limited v Aviation Utilities (WASC*) [2022] WASC 405 at [41] – [42]; *Russell v Institute of Engineers Australia t/as Engineers Australia* [2013] FCA 1250 at [82]
[25] *Russell v Institute of Engineers Australia t/as Engineers Australia* [2013] FCA 1250 at [79]

44. Fourth, the Commonwealth, as an employer, cannot simply, on an interim basis, transfer or place Ms Rugg in another parliamentarian's office (to maintain employment) in order to avoid any further difficulties between Ms Rugg and Dr Ryan. Neither does Ms Rugg seek that outcome.
45. Fifth, the Commonwealth owes statutory duties under the *Work Health and Safety Act 2011* (Cth) to keep safe and healthy each of Ms Rugg and other third parties employed by it. The evidence adduced by Ms Rugg demonstrates that each of Ms Rugg and Dr Ryan are unhappy in the employment relationship and that has the capacity to impair the health of each woman.
46. Sixth, there is no evidence of financial distress to, or economic oppression of, Mr Rugg if the termination were to proceed on 3 February 2023.
47. Seventh, it arguably places an unfair burden on the Commonwealth (in the sense of recourse to the public purse) to continue to pay Ms Rugg under her contract where she cannot provide her labour to Dr Ryan. On a fair view of the affidavit material, there is no subsisting and functional relationship between Ms Rugg and Dr Ryan. The necessary trust/confidence has dissipated. If an order were made, Ms Rugg can only sit at home on full pay. She cannot perform any substantive work for her employer while the parties await trial and determination of the matter.
48. Eighth, Ms Rugg's [moderate] delay in seeking to rescind a letter of resignation (which was accepted) is inexplicable and unexplained. If she were so convinced by the alleged improper pressure placed on her to resign, why did she not place that on the record over a period of 34 days?
49. Ninth, if the Court were to make an order preserving a troubled and dysfunctional working relationship, there is every chance the Court might be called upon to further supervise that order. That onerous burden ought be avoided where possible. The parties had agreed to a performance improvement process. That is an unremarkable element of an employment relationship, especially in the Commonwealth public sector. Upon any order maintaining the employment relationship, it may well be that the outcome of that process is a *bona fide* performance based dismissal from employment. Any interim order (to preserve employment) would likely preclude that dismissal from occurring without the parties returning to the Court for further argument.
50. In summary, the 'balance' considerations heavily favour an order dismissing the Application. The Court should not make any interim order to preserve (or direct continuation of) the employment relationship.

A possible pathway forward

51. The Commonwealth does not oppose an expedited trial process including the filing and service of pleadings by the parties where, if the Court were able to accommodate the parties, the trial be heard over say 3 to 4 days in late April 2023, subject to the parliamentary sitting timetable.

If the Court were minded to exercise the discretion and to make the interim order

52. In circumstances where interim relief is granted and Ms Rugg is maintained in her employment by order of the Court, the Court should order expedition of the proceeding to trial.

53. The Court should also require the following:

    (a) Ms Rugg is required to provide the usual undertaking as to damages; and

    (b) alternatively, Ms Rugg is required to provide a specific undertaking requiring her to repay the wages and other expenditure that the Commonwealth incurs, in the event that the originating application is dismissed.[26]

Nicholas Harrington
Counsel for the Commonwealth
2 February 2023

[26] *Maritime Union of Australia v Sydney International Container Terminals Pty Ltd* [2015] FCA 855 at [13] – [14]