NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	3/02/2023 6:53:03 AM AEDT
Date Accepted for Filing:	3/02/2023 6:53:11 AM AEDT
File Number:	VID44/2023
File Title:	SALLY RUGG v THE COMMONWEALTH OF AUSTRALIA & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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The date of the filing of the document is determined pursuant to the Court's Rules.

No. VID 44 of 2023

Federal Court of Australia

District Registry: Victoria

Division: Fair Work Division

SALLY RUGG

Applicant

COMMONWEALTH OF AUSTRALIA

First Respondent

DR MONIQUE RYAN MP

Second Respondent

OUTLINE OF SUBMISSIONS OF THE SECOND RESPONDENT

A. OVERVIEW

1. The Second Respondent (**Dr Ryan**) opposes the interlocutory relief sought at page 4, item 2 of the Applicant's Originating Application filed 25 January 2023.

2. The interlocutory relief sought is directed at preventing the Respondents from *"terminating, or allowing the termination of the applicant's employment to take effect"*, i.e., a mandatory injunction requiring specific performance of the contract of employment. The only claims advanced in the Originating Application to support such an order are those that relate to the alleged contraventions of s 340 of *Fair Work Act 2009* (Cth) (**FW Act**) relating to the alleged decision to dismiss the Applicant (i.e. paragraphs 1 – 4, 12 and 13). The claims in paragraphs 8 – 11 and 17 alleging breaches of the National Employment Standards do not logically provide a basis for interlocutory relief and the Court need not be troubled by them at this preliminary stage.

3. The Applicant does not have a prima facie case in respect of the alleged contraventions of s 340 of the FW Act, as particularised in the Originating Application. Not only is there

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a lack of precision as to how the alleged adverse action is said to fall within s 340 of the FW Act, but there is also little to no evidence that Dr Ryan, as the *"principal actor on behalf of the first respondent",*[1] *"decide[d] to dismiss the applicant (to be given effect from 31 January 2023"*.[2] Dr Ryan expressly denies making such a decision.[3]

4. The balance of convenience and other discretionary considerations weigh substantially against the granting of the interlocutory relief sought.

5. The interlocutory relief, if granted, will require the Court to supervise the ongoing performance of the Applicant's contract of employment in circumstances where: (i) the Applicant alleges that she was required to work unreasonable hours; (ii) the Applicant alleges she was exposed to a pattern of *"hostile"* and inappropriate behaviour; and (iii) the relationship between the Applicant and Dr Ryan is irreparable.

6. The Applicant delayed in making the application, the remedies available at final hearing are adequate to address any loss and/or damage suffered by the Applicant, the applicant will suffer no particular financial hardship if the order is not made, and Dr Ryan otherwise has no trust and confidence that the Applicant could continue to perform work as her Chief of Staff.

B. PRIMA FACIE CASE

7. The first issue is whether the Applicant has made out a prima facie case, in the sense of having shown *"a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial"*.[4] What is a *"sufficient likelihood of success"* depends upon the nature of the rights asserted and the practical consequences likely to flow from the orders sought.[5]

8. In establishing the existence of a prima facie case, the Applicant does not have the benefit of the reverse onus in s 361 of the FW Act, as the words of 361(2) operate as a clear prohibition on the ability of an applicant to make use of the reverse onus provision in s 361(1) when seeking interlocutory relief. As Snaden J observed:

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1 Originating Application at [13].

2 Originating Application at [2], [4].

3 Affidavit of Dr Monique Marie Ryan affirmed 2 February 2023 (**Ryan Affidavit**) at [122].

4 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 82 at [65].

5 *Beecham Group Limited v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622, approved in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 82 at [65].

> The meaning of the words of s 361(2) is clear. To have, in the process of assessing whether there is a *prima facie* case for interim injunctive relief, regard to the existence of the reverse onus for which s 361(1) provides is to proceed as though s 361(1) "appl[ies]" in that context. Yet s 361(2) says that it doesn't. The applicants cannot, at this juncture, draw any strength from the existence of the reverse onus of proof to which s 361(1) gives effect. [6]

9. To the extent it is necessary to do so,[7] the Court should conclude that any other decisions that suggest s 361(1) of the FW Act is applicable to applications for interlocutory relief are plainly wrong and, consequently, should not be followed.

10. The Applicant does not allege in the Originating Application that she has been dismissed within the meaning of s 342(1) Item 1 of the FW Act. Rather, the Applicant advances her claims on the basis that the relevant adverse action said to ground a contravention of s 340 was that the First Respondent (and Dr Ryan as the *"principal actor on behalf of the first respondent"*[8]) *"decide[d] to dismiss the applicant (to be given effect from 31 January 2023"*.[9] This gives rise to two fundamental difficulties at the prima facie case stage:

    (a) *first*, the Applicant does not, with any precision, identify how a *"decision to dismiss the Applicant"* is adverse action for the purposes of s 342 of the FW Act; and

    (b) *secondly*, the Applicant has not produced any cogent evidence that there has been such a decision. In contrast, Dr Ryan's *direct evidence* is that she did not make such a decision.

B.1 Imprecision in the Originating Application

11. The Court has been at pains to point out that claims alleging pecuniary penalties must be alleged with precision.[10]

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6 *AMWU & Anor v O-I Operations (Australia) Pty Ltd* [2019] FCA 1272 (***O-I Operations***) at [52] (Snaden J).

7 *O-I Operations* at [52].

8 Originating Application at [13].

9 Originating Application at [2], [4].

10 *CFMEU v BHP Coal Pty Ltd* (2015) 230 FCR 298 at [63] – [56] (Logan, Bromberg and Katzmann JJ); *Cleland v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306 at [102] (Bromberg J) *Australian Building and Construction Commissioner v Hall v Hall* (2018) 261 FCR 347 at [49] – [50] (Tracey, Reeves and Bromwich JJ); *Sabapathy v Jetstar Airways* (2021) 283 FCR 348 at [39] – [40] (Logan, Flick and Katzmann JJ).

12. Even allowing for some leeway at the interlocutory stage, it is still incumbent upon the Applicant to identify precisely *how* the adverse action she is alleged to have suffered meets one of the descriptors in s 342(1). The Originating Application is conspicuously vague as to that issue, and it leaves Dr Ryan in the invidious position of having to defend an application for an injunction while speculating about how the case is said to be put against her to justify such an order.

13. The fact that one is required to speculate about what adverse action the Applicant is alleged to have suffered in the s 342 sense, undermines the Applicant's ability to establish a prima facie case.

B.2 No decision made by Dr Ryan to dismiss the Applicant

14. The Applicant's prima facie case is further undermined by a lack of evidence to establish that Dr Ryan made any decision to terminate her employment. Not only does the Applicant fail to identify in the Originating Application or her supporting affidavit the date or time at which the decision to dismiss was allegedly made, there is objective evidence that the Applicant was not dismissed; but rather resigned.[11] As identified at paragraph 3 above, Dr Ryan expressly denies making any decision to dismiss the Applicant at all.

15. To the extent there is a prima facie case as to any decision having been made by Dr Ryan to terminate the Applicant's employment, it is weak at best.

B.3 No evidence of the exercise or purported exercise of the workplace rights alleged

16. The Applicant alleges that she exercised her workplace rights by *"[refusing] to work additional hours that were not reasonable."* The Applicant in this context derives the word *"refuse"* from s 62(1) of the FW Act, which concerns an employee's right to *"refuse to work additional hours";* there, as here, it is to be given its ordinary meaning.[12]

17. However, even if the presumption in s 361 applied (which it does not, for the reasons identified in paragraphs 8 and 9 above) there is little to no evidence that the Applicant has exercised or purported to exercise the rights alleged in paragraphs 2(a) – 2(f) of the Originating Application, such that the onus in s 361 is properly engaged.[13] That is, the

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11 Exhibit SR-16, First Rugg Affidavit; Ryan Affidavit at [106].

12 The word "refuse" is relevantly defined as: *"to decline to accept (something offered); to decline to give; deny (a request, demand etc.)…"* (Macquarie Dictionary (5th Ed)).

13 The party making the allegation that adverse action was taken "because" of a particular circumstance must establish the existence of that circumstance as an objective fact: *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [119]. It is for the applicant to establish all the elements of the alleged contravention other than the reasons of the respondent for taking the adverse action:

Applicant has led little to no evidence to establish that she *refused* to perform work, as directed by Dr Ryan, at any stage. Moreover, the Applicant cannot establish that she advised Dr Ryan that the reason for any such refusal was because she would be required to work additional unreasonable hours.

18. As to the Applicant's First Affidavit, the highest the Applicant's evidence rises in that respect is that:

(a) during a discussion with Dr Ryan following a meeting with a Director of Kooyong Independents Ltd,[14] a conversation to the following effect took place:

(a) *Dr Ryan remarked that there was a lot of work that needed to be done, and that she didn't know when she would have the time to do it;*

(b) *Dr Ryan asked me if I could take the work forward;*

(c) *I said that I didn't have time to do that work, and that it would not be possible for me to pick it up;*

(d) *I said that if I had to do the work, I would have to do it outside of my work hours and I did not want to do that and I could not do that;*

(e) *Dr Ryan expressed worry and frustration that the work needed to be done;*

(f) *I said to Dr Ryan that Ms Capling was due to return from Canada in about a fortnight, and that if we could wait for a fortnight, Dr Ryan could ask Ms Capling to do that work;*

(g) *Dr Ryan said she was unhappy with the fortnight's delay, but ultimately agreed to take those steps.*[15]

There is no evidence of any direction given by Dr Ryan to the Applicant to perform work, and the Applicant did not refuse to perform that work. The evidence does not even make clear what "work" the Applicant and Dr Ryan were discussing;

(b) on 6 December 2022, Dr Ryan said to the Applicant words to the effect that she had *"pushed back"* when asked to participate in an all-team meeting on Sunday, 27

Australian Building and Construction Commissioner v Hall (2018) 261 FCR 347 at [100]. These statements of principle was endorsed by the Full Court of the Federal Court in *Alam v National Australia Bank Limited* (2021) 288 FCR 629 at [14(b)].

14 Kooyong Independents Ltd is a private company that was established for the purpose of Dr Ryan's election campaign: see Ryan Affidavit at [29(c)].

15 First Rugg Affidavit at [28].

November 2022.[16] That is not evidence of an exercise or purported exercise of a workplace right, but rather it is evidence of what Dr Ryan *said to the Applicant*.

19. As to the Applicant's further affidavit affirmed 2 February 2023 (**Second Rugg Affidavit**):

(a) at [84], the Applicant deposes that Dr Ryan was *"very keen for the community engagement to start"* and *"suggested on several occasions that I should do the work myself"*. In response, the Applicant *"reiterated"* that she *"did not have the capacity to do the work"*. There was no direction, and there was no refusal to perform work;

(b) at [85] – [88], there was no direction to perform work or attend the event at Hamer Hall, and the Applicant did not refuse to attend or to perform work;

(c) at [89] – [92], the Applicant deposes that she *"jovially responded"* to Dr Ryan when she asked if the Applicant and other staff would be doing a fun run with her. This was not a refusal to attend or to perform work;

(d) at [93] – [96], Dr Ryan was scheduled to participate in a tree-planting day at Widgewar Conservation Reserve. After some discussion with Dr Ryan where the Applicant stated that she *"didn't like long bus trips"*, Dr Ryan took another staff member along with her to the event. There was no refusal to attend or perform work;

(e) at [98] – [101], Dr Ryan's electorate staff organised another attendee to accompany her to the Chinese Seniors Cultural Association Moon Festival Performance, after the Applicant said that she did not want to go. There was no direction that the Applicant perform work or attend the event, and there was no refusal to attend or perform work;

(f) at [102] – [106], the Applicant deposes in more detail to the mattes canvassed in paragraph [28(d)] of her First Affidavit. For the same reasons identified in paragraph 18(a) above, there is no evidence of any direction given by Dr Ryan to the Applicant to perform work, and the Applicant did not refuse to perform that work;

(g) at [109] – [121], there is no evidence of any direction given by Dr Ryan to the Applicant to perform work, or any express refusal to perform that work on the basis that she would be working excess and unreasonable hours;

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16 First Rugg Affidavit at [54(b)].

(h) at [123] – [127], the Applicant did not refuse to participate in the meeting on Sunday, 27 November 2022. Rather, the Applicant said that in her view the meeting was *"not necessary"* and that *"we should be aiming to create a work culture where staff do not respond to slack messages at 8:30 am on Sundays…"*. She *does not say* that she refused to attend the meeting, nor does she say that she refused to attend that meeting on the basis that she would be working excess and unreasonable hours; and

(i) At [128] – [131], Dr Ryan *"asked"* the Applicant if she was going to attend the Indian Australian Community Advisory Group roundtable. The Applicant answered Dr Ryan with words to the effect that *"No, I think Liza is going to go"*. Dr Ryan did not issue any direction to attend, the Applicant did not refuse to attend, and nor does she say that she refused to attend on the basis that she would be working excess and unreasonable hours.

B.4 Applicant was not injured in her employment

20. Paragraph 3 of the Originating Application alleges that the Applicant was *"injured in her employment"* within the meaning of s 342 of the FW Act. To establish that the Applicant has been *"injured in her employment"* for the purposes of s 342(1) Item 1(b), there must be evidence that the Applicant has suffered an injury of a legally compensable kind.[17] The Applicant has adduced no medical evidence, or any evidence at all, to support the adverse action claimed.

B.5 Denial of prohibited reasons

21. As the Court is aware, the inquiry as to whether s 340 has been contravened must focus upon the reasons for the taking the alleged adverse action. [18] Dr Ryan has expressly denied taking any action because of, or for reasons that included, the prohibited reasons alleged in the Originating Application.[19] In the absence of the reverse onus in s 361, Dr Ryan's denials of the prohibited reasons carry substantial weight.

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17 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 18 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

18 *Board of Bendigo Regional institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 (***Barclay***) at [5], [44], [146]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 at [7], [19], [85]; *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 2)* [2017] FCA 1046 at [297] – [303] (Wigney J); *Western Union Business Solutions (Australia) Pty Ltd v Robinson* [2019] FCAFC 181 at [115] – [117], [120] (O'Callaghan and Thawley JJ).

19 Ryan Affidavit at [123].

C. BALANCE OF CONVENIENCE AND OTHER DISCRETIONARY FACTORS

22. The starting position is that the Court should be cautious about making orders which have the effect of requiring employment relationships to be maintained and requiring corporations to continue operations which they may not wish to continue.[20] In order to warrant the exercise of the Court's discretion to grant interim reinstatement, an 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 pending trial"*.[21]

23. Not only has the Applicant failed to identify a sufficient likelihood of success at trial (for the reasons canvassed in Part B above), but the interlocutory relief sought by the Applicant goes significantly further than the preservation of the status quo. It is an order akin to final relief, that requires the continued supervision of the Court pending trial.

24. If the Applicant is granted the interlocutory relief sought, it will result in the Applicant returning to work as Dr Ryan's Chief of Staff, in circumstances where she alleges that she has been required to work unreasonable additional hours. The requirement to work unreasonable additional hours is in contest in the substantive proceeding, so, in those circumstances, how is it that the Applicant's hours of work and scope of her role are to be managed if she is granted the orders that she seeks? Will she accede to performing work as Dr Ryan requires, or will she only perform work on terms and conditions that she considers appropriate? The order the Applicant seeks will, at the very least, require the Court to supervise the order for specific performance of the employment contract to ensure *inter alia* that the hours of work are *"reasonable"*, and that the Applicant is performing work with the scope of her ordinary duties. An order that requires Court supervision to ensure the continued performance of the contract should not be made.[22]

25. The balance of convenience and other discretionary considerations otherwise weigh substantially against the making of the interlocutory orders sought.

26. *First*, and foremost, there has been a fundamental and irreparable breakdown in the relationship between Dr Ryan and the Applicant such that there is no possible way for

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20 See for example *National Union of Workers v AB Oxford Cold Storage Co Pty Ltd* [2017] FCA 1220 at [15] (Bromberg J).

21 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333 (Greenwood J), cited with approval in *CFMEU v Anglo Coal (Capcoal Management) Pty Ltd* (2016) 266 IR 185 at [46] (Katzmann J).

22 *JC Williamson Ltd v Lukey and Mullholland* (1931) 45 CLR 282, 297 - 298.

the Applicant to return to work in the role of Chief of Staff. This militates against the making of the orders sought.[23]

27. The relationship between a Federal Member of Parliament and their Chief of Staff is an incredibly close one, and trust and confidence is integral to that role.[24] Dr Ryan deposes that she no longer has trust and confidence in the Applicant, and states *that "I could not work with her again"*.[25] On her own evidence, the Applicant has deposed to the fact that she and Dr Ryan *"did have a close personal relationship"* and that she would be *"willing to restore a professional and productive relationship"*.[26] This is a fatal admission that there is no longer a professional or personal relationship between Dr Ryan and the Applicant. An order that specifically requires Dr Ryan to continue to work with the Applicant in those circumstances is entirely inappropriate.

28. Should the Applicant continue in her role, Dr Ryan also believes that it would adversely affect the morale of the staff in her office.[27]

29. *Secondly,* on the Applicant's case is that she was subject to a pattern of *"hostile"* and inappropriate behaviour[28] in a work environment where she was required to work unreasonable additional hours (which of course Dr Ryan denies). There is no way the Applicant could safely return to work without risk to her health and safety: (i) for the same individual alleged to have perpetrated such behaviour; and (ii) in the same workplace that she alleges these incidents took place.[29]

30. *Thirdly,* the Applicant has delayed bringing this proceedings for several weeks, in full knowledge of: (i) her resignation on 21 December 2022; (ii) the date by which her employment was scheduled to cease, being 31 January 2023; (iii) the fact that she had performed no meaningful work since 22 December 2022; and (iv) the full knowledge of

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23 *Russell v Institution of Engineers Australia t/a Engineers Australia* [2013] FCA 1250 at [82] (Foster J); *Pelecanos v Brisbane Marine Pilots Pty Ltd* [2014] FCA 294 at [13] (Rangiah J).

24 Ryan Affidavit at [125].

25 Ryan Affidavit at [126].

26 First Rugg Affidavit at [82] and [84].

27 Ryan Affidavit at [133]

28 First Rugg Affidavit at [37-38] and [45-53].

29 Noting the obligations on the Commonwealth and Dr Ryan under the *Work Health and Safety Act 2011* (Cth) (see ss 19, 20 and 27) and the *Occupational Health and Safety Act 2004* (Vic) (see ss 21 and 26) to provide a safe workplace without risk to health and safety.

the circumstances relied upon to ground the alleged contraventions of s 340 since 22 December 2022.

31. *Fourthly,* Dr Ryan would suffer substantial prejudice if the interlocutory relief was granted. As identified in Dr Ryan's affidavit, the Prime Minister has determined, pursuant to ss 12 and 13 of the *Members of Parliament (Staff) Act 1984* (Cth), that Dr Ryan is only entitled to employ *"one additional full-time staff member at the Adviser classification, in addition to [her] four electorate staff"*.[30] Given that the applicant remains employed in the her role, Dr Ryan is unable to recruit an additional person to fill that additional full-time staff member position, and if the interlocutory orders were made, she would be prohibited from recruiting for that position until the hearing and determination of the proceeding, or until further order. The consequences of not having a person who is able to perform work in that role are significant. As Dr Ryan deposes,

> I believe that if Ms Rugg continues in her employment, that will effectively exhaust my parliamentary staffer allocation. This will have the effect that I would not be able to employ an alternative Chief of Staff to work for me in my office.
>
> That support is critical to me. I have effectively had no-one performing the role of my Chief of Staff since at least 22 December 2023. It is extremely difficult for me and my office to deliver on our commitments without that additional staff member. The lack of a parliamentary staffer will significantly impede my parliamentary work when parliament resumes sitting on 6 February 2023.[31]

32. Dr Ryan has also been unable to organise an Acting Chief of Staff to step into the applicant's role. A failure to recruit an Acting Chief of Staff will *"hamper [Dr Ryan's] ability to serve the people of Kooyong"*.[32]

33. *Fifthly,* the Applicant's evidence reveals no particular hardship or difficulty if the Application were refused, and the Applicant has failed to provide any cogent evidence as to the financial effects of any refusal to grant interlocutory relief.

34. *Finally*, the remedies available at final hearing are adequate to address any loss and/or damage suffered by the Applicant.[33] Even if the Applicant was to succeed in

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30 Exhibit MRI-1, Ryan Affidavit.

31 Ryan Affidavit at [137-138].

32 Ryan Affidavit at [139].

33 It is well settled that interlocutory orders are ordinarily only granted where the remedy available at a final hearing would be inadequate: see for example *Heavener v Loomes* (1924) 34 CLR 306, 325 – 326.

demonstrating a breach of s 340 of the FW Act at final hearing, the Court is empowered to make any order it considers appropriate, including awards of compensation, reinstatement, and orders to remedy the effects of any contravention.[34]

D. DISPOSITION

35. The application for interlocutory relief should be dismissed.

36. Dr Ryan is otherwise willing to consent to an expedited timetable in the substantive proceedings which contemplates the filing and exchange of pleadings before attendance at an early mediation, to be facilitated by the Court or by private mediator.

Date: 2 February 2023

Matthew Minucci

Counsel for the Second Respondent

DLA Piper Australia

Solicitors for the Second Respondent

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[34] Section 545 of the FW Act; *Russell v Institution of Engineers Australia t/a Engineers Australia* [2013] FCA 1250 at [81] (Foster J).