31/99; [1999] VSC 380

SUPREME COURT OF VICTORIA

CARR v YANDELL

Balmford J

30 September, 14 October 1999 — 152 FLR 368

CIVIL PROCEEDINGS – BREACH OF AGREEMENT – PROCEEDINGS TAKEN IN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION FOR UNFAIR DISMISSAL – SETTLEMENT REACHED BETWEEN PARTIES – AGREEMENT BY EMPLOYER TO PAY EMPLOYEES A CERTAIN AMOUNT – AMOUNT NOT PAID – PROCEEDINGS TAKEN IN MAGISTRATES' COURT TO RECOVER AMOUNT – PROCEEDINGS IN COMMISSION NOT DISCONTINUED - WHETHER MAGISTRATES' COURT HAD JURISDICTION TO HEAR AND DETERMINE PROCEEDING: *WORKPLACE RELATIONS ACT* 1966 (CTH), SS170CE(1), 170HB(4).

Section 170HB(4) of the *Workplace Relations Act* 1996 (Cth) ("Act") provides that unless an application in the Australian Industrial Relations Commission is discontinued or fails for want of jurisdiction, a person is not entitled to take proceedings for any remedy alleging that a person's termination of employment was harsh, unjust or unreasonable. As a result of proceedings in the Commission, C. and Y. agreed to settle on the payment by C. of $2000 to Y. When C. failed to pay the sum agreed, Y. took proceedings in the Magistrates' Court to recover the $2000. When the matter came on for hearing, C. submitted that as the proceeding in the Commission had not been discontinued or failed for want of jurisdiction, the magistrate had no jurisdiction to hear the claim. The magistrate rejected this submission and proceeded to hear and determine the claim making an order in favour of Y. Upon appeal—

HELD: Appeal dismissed.

1. Some of the provisions of s170HB(4) of the Act applied to the proceedings in the Magistrates' Court namely, that it was a proceeding—

- **in respect of the termination of Y's employment;**
- **commenced by Y. whose termination was the basis of the application; and**
- **under the law of Victoria.**

2. However, the complaint in the Magistrates' Court did not allege that the termination of employment was harsh, unjust or unreasonable. The complaint was based solely on the existence of the agreement and the breach of that agreement constituted by C's failure to pay the sum of $2000 which C. undertook to pay. Accordingly, Y. was not excluded from recovering the amount unpaid in the Magistrates' Court nor was the magistrate deprived of jurisdiction to hear and determine the complaint.

BALMFORD J:

1. This is an appeal under section 109 of the *Magistrates' Court Act* 1989 against an order made on 27 April 1999 by the Magistrates' Court at Melbourne constituted by Mr R Tuppen, Magistrate, whereby the appellant on the respondents' complaint was ordered to pay the sum of $2,000 to the respondents together with interest and costs to be agreed or otherwise fixed by the court.

2. On 25 May 1999, Master Evans ordered that the questions of law shown by the appellant to be raised on the appeal were:

> (i) whether the respondents were disentitled by section 170HB(4) of the *Workplace Relations Act* 1996 (Cth) ("the Act") from taking a proceeding against the appellant by the said complaint; and
>
> (ii) whether the learned magistrate was deprived by section 170HB(4) of the Act of jurisdiction to entertain the said complaint and make the said order.

3. The relevant provisions of the Act are sections 170CE and 170HB, which read as follows, so far as relevant:

> **170CE Application to Commission to deal with termination under this Subdivision**
> (1) Subject to subsection (5), an employee whose employment has been terminated by the employer

may apply to the Commission for relief in respect of the termination of that employment:
(a) on the ground that the termination was harsh, unjust or unreasonable; or
(b) on the ground of an alleged contravention of section 170CK, 170CL, 170CM or 170CN; or
(c) on any combination of grounds in paragraph (b) or on a ground or grounds in paragraph (b) and the ground in paragraph (a).

170HB Applications alleging harsh, unjust or unreasonable termination
(1) An application must not be made under section 170CE in relation to the termination of employment of an employee on the ground that the termination was harsh, unjust or unreasonable, or on grounds that include that ground, if proceedings (the "prior proceedings") for a remedy in respect of that termination have been commenced by or on behalf of that employee:
(a) under another provision of this Act; or
(b) under another law of the Commonwealth; or
(c) under a law of a State or Territory;
alleging that the termination was:
(d) harsh, unjust or unreasonable (however described); or
(e) unlawful;
for a reason other than a failure by the employer to provide a benefit to which the employee was entitled on the termination.

(2) Subsection (1) does not prevent an application of the kind referred to in that subsection if the prior proceedings:
(a) have been discontinued by the party who began the proceedings; or
(b) have failed for want of jurisdiction.
. . .
(4) If an application of the kind referred to in subsection (1) has been made in respect of a termination, a person is not entitled to take proceedings for any other remedy that, if it had been applied for before the application would, because of the operation of subsection (1), have prevented the application unless the application:
(a) is discontinued by the appellant; or
(b) fails for want of jurisdiction.
"Commission" is defined in section 4 of the Act as meaning the Australian Industrial Relations Commission.
"Termination" or "termination of employment" are defined in section 170CD(1) as meaning "termination of employment at the initiative of the employer".

4. The facts in this matter are not in dispute. The respondents applied to the Commission on 16 March 1998 seeking relief on the ground *inter alia* that the termination of their employment was harsh, unjust or unreasonable, in terms of section 170CE(1)(a) of the Act. The appellant was the respondent to that application. By an agreement in writing dated 24 August 1998 ("the agreement") the parties agreed to settle the proceedings and their differences by *inter alia* the appellant paying the respondents the sum of $2,000 by 7 September 1998, and the respondents agreeing that on payment of that sum the appellant:

> ... is thereafter released by the Yandells and forever discharged from all claims, actions, suits, demands, causes of action and writs of whatsoever kind in any jurisdiction arising out of or in relation to (a) the subject matter of the proceedings herein;

5. The appellant, in breach of the agreement, failed to pay that sum by 7 September 1998 and the respondents brought proceedings in the Magistrates' Court under the agreement claiming payment of $2,000 together with costs and interest. When that matter came on for hearing in the Magistrates' Court the application in the Commission had not been discontinued. It was not suggested that it had failed for want of jurisdiction.

6. The appellant submitted to the magistrate that because the application in the Commission had not been discontinued, section 170HB(4) of the Act operated to deny jurisdiction to the Magistrates' Court. After taking time to consider, the magistrate rejected that submission and proceeded to hear and determine the proceeding before him.

7. The argument for the appellant is, as I understand it, in terms of subsection 170HB(4):

> (a) The application in the Commission is "an application of the kind referred to in subsection (1) . . . made in respect of a termination";

That is, the application is an application "under section 170CE in relation to the termination of employment of an employee on the ground that the termination was harsh, unjust or unreasonable, or on grounds that include that ground".

> (b) The proceeding in the Magistrates' Court is a proceeding "for any other remedy that, if it had been applied for before the application would, because of the operation of sub-section (1), have prevented the application";

That is, in terms of sub-section (1), that proceeding is "proceedings for a remedy in respect of that termination . . . commenced by or on behalf of that employee . . . under a law of a State; . . . alleging that the termination was harsh, unjust or unreasonable . . . ; or unlawful".

> (c) The application has not been discontinued by the respondents or failed for want of jurisdiction;

Accordingly, the respondents are not entitled to take the proceeding in the Magistrates' Court.

8. The sole question in issue arises in point (b) in the preceding paragraph: is the proceeding in the Magistrates' Court:

> (i) a proceeding for a remedy in respect of the same termination of employment of the respondents as gave rise to the application;
> (ii) commenced by or on behalf of the respondents;
> (iii) under a law of a State;
> (iv) alleging that the termination was harsh, unjust or unreasonable or unlawful . . .?

9. Section 15AA of the *Acts Interpretation Act* 1901 (Cth) provides*:*

> 15AA. (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

10. Counsel made submissions as to the effect of the expression "in respect of" in paragraph 8(i) above. It would appear that the purpose of section 170HB is to prevent the multiplicity of actions "in relation to" or "in respect of" the same termination. Both phrases are used in sub-section 170HB(1). "In relation to" and "in respect of" are both very wide expressions. Narrower expressions could have been employed if it had been intended to achieve a narrower purpose.

11. Section 170CH sets out the remedies which can be ordered by the Commission if it determines, after an attempt to settle the matter by conciliation under section 170CF and on completion of arbitration under section 170CG, that a termination was harsh, unjust or unreasonable. Those remedies include reinstatement of the employee, appointment of the employee to another position, payment in respect of remuneration lost, and payment of an amount in lieu of reinstatement. Where the ground of the application is that the termination is a contravention of section 170CK, 170CL, 170CM or 170CN, different remedies are available, in the Federal Court, under section 170CR. Without going into this matter further, when the provisions of section 170CE are considered, it will be apparent that the width of expression of section 170HB is necessary if multiplicity of actions arising out of the same termination is to be avoided. Thus I would be inclined to find that the phrase "in respect of" in section 170HB(1) should be given a wide interpretation, and accordingly that the Magistrates' Court proceeding was "in respect of" the termination of the employment of the respondents which gave rise to the application. If that inclination is correct, paragraph 8(i) is satisfied.

12. Turning to consider the other requirements of paragraph 8, it is not in issue that the proceeding in the Magistrates' Court was commenced by the employees whose termination of employment was the basis of the application, and was commenced under the law of Victoria. Thus the requirements of paragraph 8(ii) and 8(iii) are met.

13. However, having said all of the above, and turning to consider paragraph 8(iv), the simple answer to the question posed in paragraph 8 can be found in the Complaint of the respondents to the Magistrates' Court, which defines the proceeding in that court. While the particulars of demand recite, as a matter of history, that the application was brought on the ground *inter alia*

that the termination was harsh, unjust or unreasonable, there is no allegation in the Complaint to that effect. The Complaint is based solely on the existence of the agreement and the breach of the agreement constituted by the appellant's failure to pay the sum of $2,000 which he undertook to pay. In the absence of any allegation of harsh, unjust or unreasonable termination, paragraph 8(iv) is not satisfied and accordingly the answer to the question posed in paragraph 8 above must be No.

14. Mr Alstergren referred to clause 4 of the agreement, which provides that on default by the appellant all money due by him and unpaid "will become immediately due and payable and the [respondents] shall be entitled to reinstate the proceeding [in the Commission] and enter judgment against [the appellant]". However, while that provision entitles the respondents to take action in the Commission to recover the money, it does no more than that. It does not restrict them to that course so as to exclude recovery of the amount unpaid in the Magistrates' Court on the basis of the breach of the agreement.

15. Mr Alstergren also referred to the authorities on the operation of such provisions as section 22 of the *Federal Court of Australia* Act 1976 as indicating the importance in principle of avoiding the multiplicity of proceedings. However, those authorities turn on the specific terms of the provisions in question and are not of relevance in the present case.

16. For the reasons given, I find that section 170HB(4) has no application to the proceeding in the Magistrates' Court. The answers to each of the questions in the Order of Master Evans made on 25 May 1999 is No. The appeal will be dismissed. Counsel may wish to make submissions as to costs.

APPEARANCES: For the appellant Carr: Mr WE Alstergren, counsel. Goldsmiths, solicitors. For the respondents Yandell: Mr A Larkin, counsel. Melville, Orton & Lewis, solicitors.
