REGIONAL EXPRESS HOLDINGS LIMITED v AUSTRALIAN FEDERATION OF AIR PILOTS (M71/2017)

Court appealed from: Full Court, Federal Court of Australia
[2016] FCAFC 147

Date of judgment: 26 October 2016

Date special leave granted: 12 May 2017

The appellant is a company which provides commercial aviation services. On 5 September 2014, it sent a letter to people who had applied and been shortlisted for its cadet employment program. The respondent, a registered organisation of employees under the *Fair Work (Registered Organisations) Act* 2009 (Cth), alleged that the letter contravened various civil remedy provisions of the *Fair Work Act* 2009 (Cth) ("the FW Act").

On 15 April 2015, the respondent applied to the Federal Circuit Court of Australia for (inter alia) the imposition of pecuniary penalty orders for these alleged contraventions, pursuant to item 11 of section 539(2) of the FW Act. The appellant applied to the Court for orders that the respondent's application be summarily dismissed on the basis that the respondent lacked standing to bring the proceeding because it could not demonstrate that it was "*entitled to represent the industrial interests of*" the affected persons under s 540(6)(b)(ii) of the FW Act. Judge Reithmuller found that the respondent was entitled to represent the industrial interests of the unidentified affected people, because they were capable of becoming members of the respondent under its membership eligibility rules.

The appellant's appeal to the Full Federal Court (North, Jessup & White JJ) was unsuccessful.

The Court considered the use of the phrase "*entitled to represent the industrial interests of*", and its variants, in past industrial legislation, concluding that throughout the period in question the legislature had treated it as a given that it was an organisation's eligibility rules which gave it the entitlement to represent the industrial interests of employees, and intending employees, whether or not they were actual members. The question was, therefore, did the FW Act alter that situation?

The Court noted that, in the *Workplace Relations Act* 1996 (Cth) after the Work Choices amendments, the qualifier "*under its eligibility rules*" was included in references to an organisation's entitlement to represent the industrial interests of employees, whereas the FW Act contains no such qualifier. The appellant submitted that the removal of the qualifier amounted, in effect, to a signal of legislative intent that eligibility alone should no longer be regarded as sufficient to generate an entitlement to represent the industrial interests of the person concerned. The Court found that the better way of looking at it, however, would be to regard the qualifier as a limitation upon the circumstances which might, factually, give rise to the entitlement in a particular case: the entitlement could not arise otherwise than under the eligibility rules. Once the qualifier was removed, as it was with the enactment of the FW Act, there was no limitation upon the range of circumstances which might give rise to the entitlement. But the premise that eligibility would always amount to

one such circumstance, sufficient of itself to give rise to the entitlement, was not undermined by the removal of the qualifier.

Although the construction of s 540(6) of the FW Act which attracted itself to the primary Judge involved a substantive change in the law, the Full Court found that consideration could not prevail in the face of the reality that in the FW Act the legislature introduced a standing provision which departed substantially from its predecessor. While the content of the phrase "*entitled to represent the industrial interests of*", was undoubtedly problematic, the Court could not ignore this departure. The pattern of s 539 of the FW Act was to consolidate what was previously a miscellany of standing provisions, and to employ the phrase in a setting with which it had not been associated in any previous corresponding provision. Most pointedly, for an organisation to have standing in circumstances where it was not itself affected, it was no longer an express requirement that the individual who *was* affected be a member of it.

Therefore, in the case of an organisation, coverage of a person under its eligibility rules would be sufficient of itself to bring the organisation under the provisions of the FW Act which operate by reference to the formula, "entitled to represent the industrial interests of", *a propos* the person.

The ground of appeal is:

- The Court below erred in its construction of s 540(6)(b)(ii) of the *Fair Work Act* 2009 (Cth), by concluding that an "industrial association" that was an organisation registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth) was "entitled to represent the industrial interests" of affected persons who were merely eligible to be members of the organisation pursuant to its eligibility rules, despite not being actual members of that organisation.